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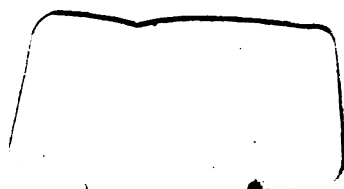
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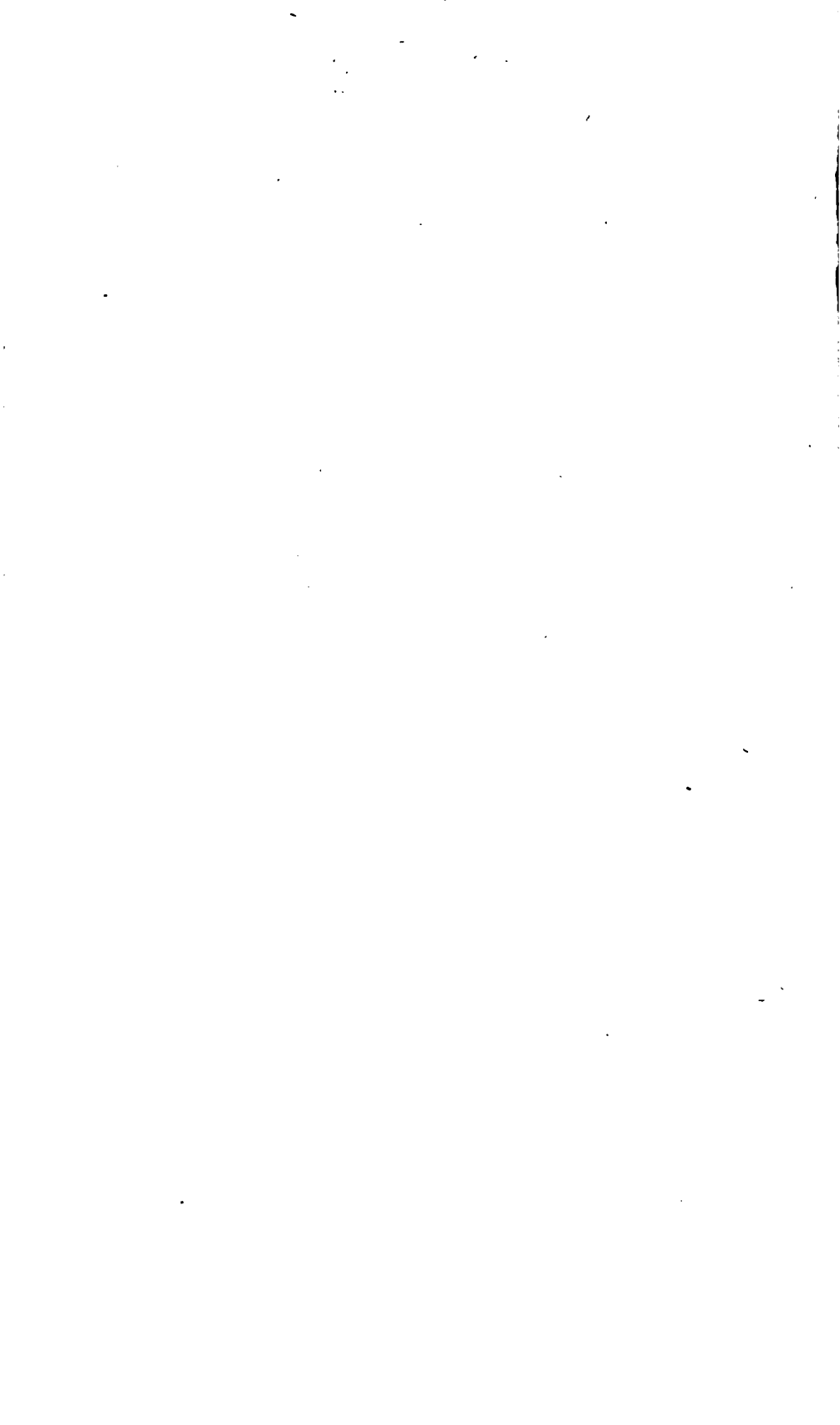
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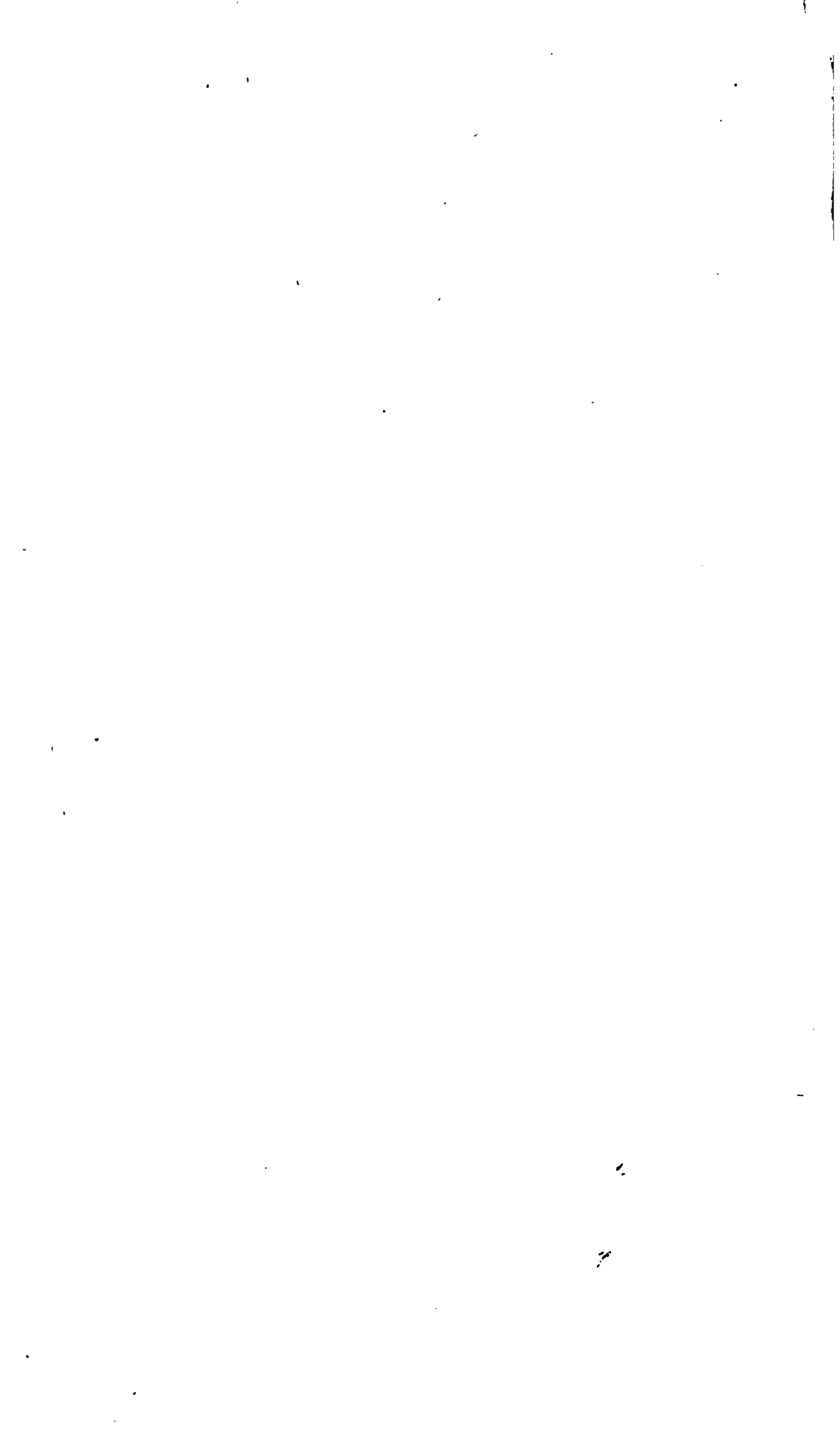


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OF
Cases in Law and Equity
DETERMINED IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LIV.

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Rec March 12. 1870

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JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1869.

FIRST JUDICIAL DISTRICT.

- CLASS 1. THOMAS W. CLERKE.*
" 2. JOSIAH SUTHERLAND.
" 3. DANIEL P. INGRAHAM.
" 4. ALBERT CARDOZO.
" 5. GEORGE G. BARNARD.†

SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.†
" 2. JOSEPH F. BARNARD.*
" 3. JASPER W. GILBERT.
" 4. ABRAHAM B. TAPPEN.

THIRD JUDICIAL DISTRICT.

- " 1. THEODORE MILLER.*
" 2. CHARLES R. INGALLS.
" 3. HENRY HOGEBOOM.
" 4. RUFUS W. PECKHAM.†

FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.†
" 2. ENOCH H. ROSEKRANS.*
" 3. PLATT POTTER.
" 4. AUGUSTUS BOCKES.†

JUSTICES OF THE SUPREME COURT.

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- CLASS 1. WILLIAM J. BACON.*
 " 2. HENRY A. FOSTER.
 " 3. JOSEPH MULLIN.
 " 4. LE ROY MORGAN.†

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 " 2. RANSOM BALCOM.*
 " 3. DOUGLASS BOARDMAN.
 " 4. JOHN M. PARKER.†

SEVENTH JUDICIAL DISTRICT.

- " 1. CHARLES C. DWIGHT.*
 " 2. ERASMUS DARWIN SMITH.
 " 3. THOMAS A. JOHNSON.
 " 4. JAMES C. SMITH.†

EIGHTH JUDICIAL DISTRICT.

- " 1. CHARLES DANIELS.†
 " 2. RICHARD P. MARVIN.*
 " 3. GEORGE D. LAMONT.§
 " 4. GEORGE BARKER.

MARSHALL B. CHAMPLAIN, *Attorney General.*

* Presiding Justice.

† Re-elected, November, 1868.

‡ Sitting in the Court of Appeals.

§ Appointed by the Governor, November, 1868, to fill the vacancy caused by the resignation of Judge DAVIS.

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J. BEEKMAN FINLAY *vs.* THEODORE COOK.

The premises intended to be conveyed by deeds were described as being 200 acres, more or less, in the right of W., K. & C., in lot No. 1, in the 24th allotment of the patent of K. *Held* that as this description contained several particulars, no lands could pass by the deeds, except such as corresponded with all the particulars.

That it was necessary that those claiming under such deeds should show that the lands claimed were in lot 1, and in that part of the lot to which the right of W., K. & C. extended; and if such right included more than 200 acres, the grantees would have been authorized to elect which 200 acres in the tract they would take, and such election would have made the grant operative, although the description was so uncertain that, of itself, it would convey nothing.

And no evidence being given, as to what part of lot 1 was covered by the right of W., K. & C., it appearing that K. alone claimed lot C in lot 1, but the lands conveyed were not a part of those claimed by K. alone; it was *held* that the deeds were ineffectual to establish the plaintiff's title to a particular portion of lot C in lot 1.

Possession by a tenant, of a portion of a lot of land, under a lease, and the clearing up and cultivating a part thereof, such possession being under a claim

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of title by the lessor, which is evidenced by his executing the lease and demanding and receiving rent, is a good adverse possession, at least to the extent of the land cleared and cultivated.

A comptroller's deed, given upon a sale of land for taxes, with actual possession of a part of the lot embraced in it, and claim of title to the whole, is a sufficient foundation for an adverse possession, even though the comptroller had not authority to sell.

If such deed be fair upon its face, and contains no evidence of want of authority by the comptroller to execute it, inasmuch as it purports to be executed under an authority, it gives color of title to the grantee, although the pretended authority recited upon its face does not in fact exist.

The possession and claim of title of the grantee in such a deed, and of those claiming under him, will be presumed to have been in accordance with the title apparently derived from the comptroller's deed; and as that deed did not show that it was illegal or void, the possession and claim under it will be presumed to have been in good faith, and therefore adverse to the title of the former owner, and if continued for the period of twenty years, will ripen into a perfect title.

Actual possession of a part of lot of land, with claim of title to the whole, the entry and claim being under a written instrument, is sufficient to constitute an adverse holding of the whole lot.

Persons in possession of land, under the title of another, are estopped to deny his title, or to set up an outstanding title in themselves or any other person.

Where a valid constructive possession of an entire lot is acquired by entry under claim of title founded upon a written instrument, and the actual occupation of a part, it cannot be defeated by a subsequent entry on the same lot by another, who makes an improvement on a part and obtains title to the whole lot.

The effect of such subsequent entry would be to give the person so entering a possession of the part actually occupied and improved, but no further. A constructive possession of the unimproved part of the lot would remain in him who made the first entry under claim and color of title and improved in part.

Section 55 of the act of the legislature of 1855, (*Laws of 1855, p. 799*), made comptrollers' deeds for lands sold for taxes, *executed after the passage of that act*, presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular. This section was amended in 1860, (*Laws of 1860, ch. 209*), by adding thereto as follows: "But where the person or persons claiming title under such conveyance, or the grantees or assignees of such persons, shall be in possession of the land described therein, either by himself or themselves, or his or their grantees, assignees, agents, tenants or servants, then such conveyances shall be presumptive evidence of the facts above stated, *whatever may be the date of such conveyance.*" This amended section

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should be construed as including not only the case of an actual possession of the whole lot covered by the deed, but the constructive possession of the whole, when there is actual possession of a part of the land covered by the deed, with claim of title to the whole.

Giving the section that construction, the title of a party claiming under a comptroller's deed is perfect, without proof of any other fact than that he was in possession of a part of a lot under the deed, claiming title to the whole.

APPEAL from a judgment entered upon the report of a referee. The action was originally commenced before a justice of the peace, for trespass upon lot C, in lot 1 of great lot 1 in the 24th allotment of the Kayaderosseras patent. Title being pleaded, by the defendant, the present action was commenced in this court. The complaint was for entering upon the premises above mentioned, and cutting and carrying away timber and wood, and hay and other crops growing on said lot. The defendant, by his answer, denied that he had entered upon, or cut any wood, timber or trees upon, or had carried away any timber, trees, grass or any thing else, from the north part of lot C, in lot No. 1, in great lot No. 1 of the 24th allotment of the patent of Kayaderosseras, described in the complaint; such north part being about forty acres, late in the use and occupation of Warren Harvey. For a second defense, the defendant averred that at the time when, &c., the south part of the said lot, except about forty acres at the north end of the same, were the close, soil and freehold of John W. Bates, and that by the license and authority of the said John W. Bates the defendant did enter upon said south part of the said lot, as he lawfully might, and did then and there the acts complained of in said complaint.

The action was referred to a referee, who found the following facts:

The 24th allotment of the patent of Kayaderosseras was divided into thirteen great lots, numbered from one to thirteen, inclusive. Lot No. 1 was subdivided into three long parallel lots, by lines running nearly north and

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south, and numbered 1, 2 and 3. Lot No. 1 of this subdivision was again divided, by transverse lines, into three lots, A, B and C. Lot C is the northernmost lot; it is about two and a half miles in length from north to south, and contains about 348 acres. On the 29th of March, 1792, the executors of John Kirby, deceased, under a power contained in his last will and testament, conveyed by deed to Dirck Lefferts of the city of New York, "lot C, in lot No. 1 in the subdivision of lot No. 1 of the 24th allotment of the Kayaderosseras patent" The lot was unoccupied and in a state of nature, being covered with standing timber. In 1799 Dirck Lefferts died in the city of New York, leaving a will, which in the same year was admitted to probate, before the surrogate of the county of New York. The testator, by this will, directed his executors to sell, with the consent of John K. Beekman first obtained, all his lands not specifically disposed of by his will. John K. Beekman, John Oothout and Thomas Storm were constituted his executors. Neither lot C, above mentioned, nor any part thereof, was specifically disposed of. On the 2d day of May, 1803, the said executors conveyed by deed, to Phillip Ten Eyck, several lots of land in the Kayaderosseras patent, describing them, and amongst them is "two hundred acres, more or less, in the right of Walton, Kirby and Clopper, in lot No. 1 in the twenty-fourth allotment." On the 3d day of May, 1803, Phillip Ten Eyck conveyed the same lots of land, by the same description, to John K. Beekman. On the 11th of November, 1819, Mr. Beekman, by an instrument in writing under seal, executed by and between himself and Elizabeth Turk, leased to her for her life "all that certain lot No. 2 of the smaller lots in lot No. 1 of the subdivision of lot No. 1 of the twenty-fourth general allotment of the patent of Kayaderosseras, containing one hundred acres of land, and is situate in the town of Corinth, in the county of Saratoga." The first actual occupation of any part of lot C was by

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Mrs. Turk, soon after the execution of this lease. Under it she cleared up and cultivated eight or ten acres adjoining the west line of lot C, and near the middle of said west line. The northern limit of this clearing nearly coincides with the line between the said towns. 122 acres of lot C, taken from the north end, lies in Day, and the residue of the lot (226 acres) lies in Corinth. Subsequently Mrs. Turk occupied and cultivated a few acres on the north end of lot C, in the vicinity of the framed house afterwards erected by Effner & Rockwell. She afterwards abandoned it, and it was occupied for a time by Daniel Austin. He abandoned it, and it remained unclosed and unoccupied until Mrs. Turk's death. She occupied, or did not abandon, the occupation of the eight or ten acres covered by her lease, during her life. She died about the year 1851. On the 1st day of March, 1834, the comptroller of the state of New York made and executed to Mr. Beekman a deed of three hundred and forty-eight (348) acres, of which 226 acres is in the south part of subdivision "C," and bounded on the north by the town line, east by lot 2, and on the south and west by lot line; also 122 acres, bounded north by Sibley, south by town line, and on the east and west by lot lines, "in subdivision 'C,' of lot No. 1 of great lot No 1 of the XXIVth allotment of the patent of Kayaderosseras." The said deed contained the recitals then usually inserted in such deeds; to the effect that default had been made in the payment of taxes assessed on said lands, in pursuance of chapter thirteen of the first part of the Revised Statutes, entitled "Of the assessment and collection of taxes," which taxes, with the interest and charges thereon, had remained unpaid in the comptroller's office for two years from the 1st of May following the year in which they were assessed; then stating the sale of the lands in question by the comptroller, at public auction, in May, 1830, and that they had not been redeemed within the two

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years prescribed by law for the redemption thereof; that the said John K. Beekman had become entitled by purchase and transfer from the original purchaser at said sale, to said lands, and then conveying the said lands in fee to the said John K. Beekman.

John K. Beekman died in the city of New York, in 1842, leaving a will, which in the same year was admitted to probate before the surrogate of the county of New York. By this will, after disposing of some pieces of land other than the premises in question, he devised all the residue of his real estate as follows: one-half thereof to Aletta Beekman, one-fourth thereof to Sarah James, and one-fourth thereof to Anne Finlay, if living at his decease, but if not living, then to her children in equal portions. The plaintiff is one of the children of Anne Finlay. She died August 5, 1842. Previous to 1852 her children and the other devisees above named conveyed to the plaintiff all their interest in said lot C.

In 1847 the plaintiff contracted with Effner & Rockwell for the sale of the lot to them at \$2 per acre. They entered under the contract, paid \$100 towards the purchase money, cut down and removed timber, and erected the framed house where Squire Houghton now lives. They put Isaac Mickles in the house to board the men who were lumbering on the lot, and they afterwards, upon his removal, put Samuel Effner in for the same purpose; and he continued to board them until he left the house, as hereinafter stated. Effner & Rockwell continued this occupation until the entry of Andrew Bingham, hereinafter mentioned.

In 1708, Anne, the sovereign of Great Britain, by letters patent, under the great seal of the Province of New York, granted to Adrian Hooglandt and Jovis Hooglandt and eleven others the patent of Kayaderosseras. Jovis Hooglandt died without lineal heirs. Belitia Hooglandt was one of the three daughters of Adrian Hooglandt, and

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was married to James Renaudet. James Renaudet and Belitia his wife left six children, one of whom was Mary, who married Peter Chevalier. Another was Ann, who married Townsend White. Another died without issue. Peter Chevalier and his said wife Mary had issue—Isabella, who married George Turner. They had issue—Mary Sophia R. Turner. Her mother and all her ancestors, back to Adrian Hooglandt, are dead. Ann White had four children, among whom was Isabella, wife of William Edgar. Their son, Herman Le Roy Edgar, on the 27th day of November, 1843, conveyed by deed, to the said Mary Sophia R. Turner, all his interest in the Kayaderosseras patent. On the 31st day of January, 1848, and whilst Effner & Rockwell were in the occupation of the said lot as aforesaid, the said Mary Sophia R. Turner conveyed lot C, by deed, to Andrew Bingham. After the said conveyance, and in 1848, Bingham entered upon lot C under the aforesaid deed, and commenced cutting down trees and peeling bark. In March, 1849, Aletta Beekman and others brought an action of trespass in this court, against Bingham, for the said entry, &c., and on the trial the plaintiffs were nonsuited, upon the ground that the comptroller's deed above referred to was defective. After this trial Effner & Rockwell abandoned the lot, and Bingham continued cutting down and removing timber. He cleared up thirty or forty acres south of and adjacent to the framed house. In 1849 he hired Samuel Effner, who occupied the framed house, to remove from it, and erected a log house fifty or sixty rods southeasterly therefrom, and on lot C, which was used in connection with his lumbering operations on the lot. Bingham cut the hemlock timber over nearly the whole lot, and, (with the exception of Mrs. Turk, who used the land cleared up by her until her death, in 1851,) was the sole occupant, by himself and those occupying under him, until 1856. One Burrows moved into the framed house after Samuel Effner left,

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and occupied it under Bingham, and worked at lumbering on the lot for Bingham. Bingham continued lumbering on the lot, and cultivating some of the cleared land, until December 5, 1851, when he conveyed the lot by deed to John W. Bates, who succeeded to Bingham's occupation. In the spring of 1852 Bates leased the whole lot to the defendant, including the two houses, and the defendant soon afterwards let the whole lot to Silas N. Holden, to cultivate it on shares. He lived in the framed house and his mother in the log house, both occupying under Bates' title. In August, 1856, while this occupation continued, the plaintiff and Silas N. Holden entered into an agreement in writing, under seal, whereby the plaintiff leased to him a certain lot of land in the town of Day, known as sub-lot 1 of great lot 1 of the 24th allotment of said patent, containing 348 acres, more or less, and known as lot C, for five years from the 1st day of April previous, at an annual rent of \$25. Holden remained in the framed house and his mother in the log house, until about March, 1860. During this time Holden cultivated the cleared land on the north end of lot C and in the vicinity of the house in which he lived. On the 18th of January, 1860, the plaintiff and Warren Harvey entered into an agreement in writing, under seal, whereby the plaintiff leased to Harvey, for one year from that time, all that certain lot in Day, known as sub-lot 1 of great lot 1 of the 24th allotment of said patent, containing about 348 acres, at a rent of \$20. Holden moved out in March following, and Harvey moved in and occupied the framed house, and cultivated the same land which Holden had cultivated, until the expiration of his lease, and remained under Squire Houghton until the spring of 1862. After Holden's mother quit the log house it was occupied, and has ever since continued to be occupied, together with an acre or two of cleared land surrounding it, by persons holding under Bates' title. This small piece of cleared

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land has always been occupied by the occupant of the log house. On the 18th of March, 1861, the plaintiff and Squire Houghton entered into an agreement under seal, whereby the plaintiff leased to Houghton, for one year, all that certain lot of land in Day, known as sub-lot 1 in great lot 1 of the 24th allotment of said patent, containing about 348 acres. Houghton moved in, in the place of Harvey, in March, 1862. In all these leases the lot is described as belonging to the plaintiff. Some time in the winter of 1862, and before Harvey removed, the defendant, by the authority and license of said Bates, cut down and carried away from the lot six standing trees, of the value in the aggregate of \$2. The place where these trees were cut down was in Day, in the uncleared portion of lot C, on the northernmost 100 acres of lot C, and not upon the thirty or forty acres referred to in the defendant's answer. It was near the line fence between this lot and the defendant's lot, which adjoins it on the east, and southeastwardly from the framed house, and northeastwardly from the log house, and a few rods from the border of the woods adjacent to the cleared land occupied by Harvey, and in the woods, but nearer to the log house than to the framed house. The defendant cut down the trees for the purpose of having the title to the lot tested.

About the year 1837 Bosworth Martin, the agent of John K. Beekman for his lands in the 24th allotment, went upon the uncleared portion of lot C, and discovered some men abiding in a shanty and manufacturing staves from an ash tree which they had felled on the lot. They desisted, and settled with Mr. Beekman for the damages.

The referee's conclusion of law from the foregoing facts was, that the plaintiff was not entitled to recover of the defendant for the injury stated in the complaint; and he ordered the complaint to be dismissed, with costs. From the judgment entered upon this report, the plaintiff appealed.

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Lewis Varney, for the appellant. I. The facts found by the referee show conclusively that the plaintiff succeeded to all the title and possession of John K. Beekman, whose occupancy, by his tenant Mrs. Turk, was continued from November 11, 1819, until her decease in the autumn of 1851.

II. Computing only from the date of Mrs. Turks' lease, without reference to any prior occupation, or allusion to Bosworth Martin's agency and its protective results, the twenty years that tolled all right of entry against Mr. Beekman, and perfected his absolute title, expired on the 11th day of November, 1839; and her occupation continued in all 32 years, down to 1851. During this time Mrs. Turk occupied and cultivated a few acres on the north end of the lot, in the vicinity of the framed house. (2 R. S. 294. *Code of Procedure*, 83.)

III. And that, too, without regard to any deeds; one of which, dated the 29th of March, 1792, conveyed Kirby's estate to Lefferts, whose title from devise (deed to Ten Eyck, dated the 3d of May, 1803) vested in Mr. Beekman. The last mentioned is enough. Our purpose is only to show, under the statute, a constructive possession of the whole lot, whereof, by Mrs. Turk's occupancy and otherwise, Mr. Beekman and his successors had a *pedis possessio*. (*Palmer v. Aldridge*, 16 Barb. 131. *Smith v. Lorillard*, 10 John. 337. *Jackson v. Harder*, 4 id. 202.)

IV. The Finlay possession, being a continuation of Mr. Beekman's, was confirmed by the contract of sale to Effner & Rockwell, who thereby became *quasi* tenants to the plaintiff; under whom Effner & Rockwell went into actual possession, paid \$100, and in 1847 lumbered there extensively, erected a frame house where Squire Houghton now lives, and built a log barn; his brother, Samuel Effner, occupying them as Mickles' successor, and as the hired man and tenant of Effner & Rockwell; who, and every person succeeding to his possession, (whether by purchase,

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collusion or attornment,) is estopped from gainsaying the plaintiff's title, under which, and by virtue of the contract made in 1847, Effner & Rockwell acquired actual possession of lot C. In 1849 Bingham bought out Samuel Effner, and he then gave up possession to Bingham. The phraseology in the report is nothing more nor less than a selling out to Bingham by Effner & Rockwell's tenant. Silas Holden's alleged attornment to the plaintiff, in hostility to Bingham and Cook, applies only to the *cleared land*, as he was to work the land on shares; as to which Harvey is (if at all) estopped. But the possession of both endured to the benefit of the plaintiff, at his option. He had a right to retake actual possession by adopting Holden as tenant, thereby creating the relation of landlord and tenant. The above remarks as to incapability of attornment apply to Bingham, to Cook, to Silas Holden, and to his predecessor Nims. (3 R. S. 5th ed. 35, § 3. *Jackson v. Harder*, 4 John. 202. *Cook v. Travis*, 23 Barb. 338. *Spencer v. Tobey*, Id. 260.)

V. The plaintiff's possession was never abandoned by him; and the Effner & Rockwell contract could not abandon it, or attorn. That possession therefore—never relinquished—is sufficient to maintain this action for an injury to the reversion or inheritance. (3 R. S. 5th ed. 39, § 8.)

VI. Independent of other title and possession, Beekman obtained a perfect title by virtue of the comptroller's deed, dated March 1, 1834.

VII. The plaintiff can maintain trespass for an injury to the reversion or inheritance, notwithstanding Squire Houghton's subsisting lease for a short term. (3 R. S. 5th ed. 39, § 8, *cited above*.)

VIII. Houghton is an original tenant of the plaintiff, who had a right to treat Silas Holden and Harvey as his, the plaintiff's, tenants, and even to take attornments from them respectively, for the reason above stated, that they came in directly or indirectly under Bingham, and are

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therefore, like Bates and Cook, estopped from denying the Finlay title. Nor can either of them, any more than Silas Holden, or his mother, or other sub-tenant, attorn to any person, especially to Bates or Cook. For the effect of this point and statement, it must not be forgotten that Bingham bought out Samuel Effner, the tenant of Effner & Rockwell. Independent of this, Holden moved off from the lot in March, 1860, and quitted the premises, and immediately after Harvey moved into the framed house, under and by virtue of a lease from the plaintiff, dated the 18th of January, 1860. Hence the plaintiff took actual possession of the lot after Holden (the pretended tenant of Bates) had left. (See Point III.)

IX. That adverse possession of the plaintiff, through the medium of Effner & Rockwell, rendered the Turner deed (dated January 31, 1848) to Bingham absolutely void, even if Miss Turner had a perfect title, which is not shown. The same remark applies to all the Turner deeds. (3 R. S. 5th ed. 30, § 167.) 1 *John. Cas.* 33, and 2 *Caines' Cas.* 314, show that a void deed cannot be valid for any purpose; especially the reason or design for which it is declared void by statute—void *in toto*.

X. Even if a perfect title in Miss Turner could have been shown, it can be available to her only in ejectment by her, or at least in her name, under the amended Code. Such title in her is of no benefit as a defense for Cook, in the pretended right of Bates, who cannot claim through a void deed to Bingham, the deed to Bates himself being in the same condition. (*Hay v. Cumberland*, 25 Barb. 594.)

XI. The *locus in quo* was actually in the border of the woods, and not upon the acre or two of land occupied by the pretended tenants (if any) in the log house, under Bates' title. The plaintiff was then in possession of all the lot, except (perhaps) as above stated.

XII. A disclaimer, or conveying by lessee in fee, may be, by the lessor, treated as a forfeiture, or held for naught,

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as in case of an attornment. The lessee is, in ejectment, estopped to show title out of the vendor. (*Jackson v. Davis*, 5 Cowen, 123. *Jackson v. Smith*, 7 id. 717. *Jackson v. Hotchkiss*, 6 id. 401. *Jackson v. Harper*, 5 Wend. 246. *Lawrence v. Brown*, 1 Seld. 394. *Jackson v. Stiles*, 1 Cowen, 575. 3 Wend. 339. 5 Seld. 45.)

XIII. The occupation of Mrs. Turk under a life lease from Mr. Beekman, and her cultivating a few acres during some portion of that time, where the framed house now stands, (in addition to her possession on the south end,) shows that her possession extended over the whole lot. The Harvey and Houghton lease, the Effner & Rockwell contract, and their entry upon the lot as original tenants of the plaintiff, under a color of title, extended in fact over the 348 acres. An actual possession of part, under claim of title to the whole of a lot, is adverse as to the whole. (*Jackson v. Bowen*, 1 Cai. 358. *Jackson v. Elston*, 12 John. 452. *Jackson v. Vermilyea*, 6 Cowen, 677. *Code of Procedure*, § 83.)

XIV. The defendant seeks to found his title upon letters patent granted in 1708, by Anne, sovereign of Great Britain, to Adrian Hooglandt and Jovis Hooglandt. The objection was taken upon the trial to this, that it was incumbent upon the defendant to prove the regular appointment of the three commissioners, in pursuance of the colonial act passed January the 8th, 1762, which was not done. The recital in a book containing a record of the proceedings of the commissioners, in making partition, is not legal proof. No fact having been found as to the appointment of the commissioners, of course this pretended title avails nothing as a defense to this action. (*Munro v. Merchant*, 26 Barb. 383. *Jackson v. Witter*, 2 John. 180.)

Judiah Ellsworth, for the respondent.

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By the Court, ROSEKRANS, J. The referee states the description of the premises intended to be conveyed by the deed from the executors of Lefferts to Ten Eyck and by Ten Eyck to Beekman, to have been two hundred acres, more or less, in the right of Walton, Kirby and Clopper, in lot No. 1 in the 24th allotment of the patent of Kayaderosseras. This description contains several particulars, and no lands could pass by the deed except such as corresponded with all the particulars. It was necessary that those claiming under these deeds should show that the lands claimed were in lot one, and in that part of the lot to which the right of Walton, Kirby and Clopper extended. If such right included more than two hundred acres, the grantees would have been authorized to have elected which two hundred acres in the tract they would take, and such election would have made the grants operative, although the description is so uncertain that, of itself, it would convey nothing. (*See opinion of Beardsley, J., in Hathaway v. Power, 6 Hill, 459.*) No evidence was given in the case as to what part of lot one was covered by the right of Walton, Kirby and Clopper. It appeared that Kirby alone claimed lot C in lot one, but the lands conveyed were not a part of those claimed by Kirby alone. These deeds were therefore wholly ineffectual to establish the plaintiff's title to the portion of lot C in lot one, upon which the trespasses complained of were committed. It was, however, unnecessary for the plaintiff to resort to the deed mentioned, for the purpose of sustaining his action.

It appeared that as early as 1819 John K. Beekman, under whom the plaintiff claims title, was in possession, by his tenant, Mrs. Turk, of a portion of lot C, to whom in that year he leased one hundred acres, and that Mrs. Turk cleared up and cultivated under this lease eighteen acres near the middle of lot C and adjoining its west line, and that such possession continued until her death, in 1851. This possession being under a claim of title by Beekman, which

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was evidenced by his executing the lease and demanding and receiving rent, was a good adverse possession, at least to the extent of the land cleared and cultivated by his tenant. In 1834 Beekman obtained the comptroller's deed for the whole of lot C, upon the sale of the lot for taxes, and the evidence shows that after that time he claimed to own not only the part cleared and cultivated by his tenant, Mrs. Turk, but also the residue of the lot which was uncleared. The comptroller's deed, with actual possession of a part of the lot and claim of title to the whole, was a sufficient foundation for an adverse possession even though the comptroller had not authority to sell. (*Blackwell on Tax Titles*, 663 to 670.) This deed was fair upon its face. It contained no evidence of want of authority by the comptroller to execute it. As it purported to be executed under an authority, it gave color of title to the grantee, although the pretended authority recited upon its face did not in fact exist. The possession and claim of title of Beekman, and of those claiming under him, is presumed to have been in accordance with the title apparently derived from the comptroller's deed; and as that deed did not show that it was illegal or void, the possession and claim under it are presumed to have been in good faith, and therefore adverse to the title of the former owner, and if continued for the period of twenty years, ripened into a perfect title. The question then arises whether the findings of the referee show that possession and claim of title by Beekman, and those claiming under him by virtue of the comptroller's deed, was continued for the period of twenty years prior to the committing the trespasses complained of. I think this fact is clearly deducible from the referee's findings. Actual possession of a part of the lot with claim of title to the whole, the entry and claim being under a written instrument, is sufficient to constitute an adverse holding of the whole lot. Mrs. Turk's occupation of that part of lot C, which she cleared, is found to have

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continued from 1834 to 1857. In 1847 the plaintiff, who had taken a conveyance of the lot from the devisees of Beekman, contracted to sell the whole lot to Effner & Rockwell, and they entered under the contract and cut down and removed timber from the lot and erected a framed house upon it, and put Samuel Effner into possession of the house for the purpose of boarding their hands. In 1848, while Effner & Rockwell were thus in possession under the contract with the plaintiff, one Bingham took a deed of the lot from Mary S. R. Turner, a remote heir of one of the thirteen original patentees of the Kayaderosseras patent. From the evidence and findings of the referee her share was 1-195th of the lot. In 1843 Mrs. Turner took a deed from another remote heir of one of the patentees, apparently having an equal interest with her, of all his interest in the patent, and the deed from Mrs. Turner to Bingham purported to convey the entire lot. In 1849 Aletta Beekman and others, devisees of John K. Beekman, commenced an action against Bingham for cutting timber upon the lot, and upon the trial of the action the plaintiffs were *nonsuited*, on the ground that no evidence was given to show the proceedings prior to the comptroller's deed authorizing a sale of the lot for taxes. The referee finds that after this trial Effner & Rockwell abandoned the lot. But he does not find that he restored to the plaintiff the possession of the framed house or the land on which it stood. On the contrary, it appears that their servant, or tenant, Samuel Effner, still continued in possession of that house, and that Bingham subsequently, in 1849, hired him to remove from the house, and that upon his removal Bingham entered and put one Burrows into possession of it as his tenant. In December, 1851, Bingham conveyed the whole lot to Bates, who succeeded Burrows in the occupation of the framed house, and in 1852 Bates leased the whole lot to the defendant, and the defendant leased the whole lot to Holden, who moved into

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the framed house, and in 1856, while Holden was in possession of that house, *the plaintiff* leased the whole lot to Holden for five years. Holden remained in possession of the framed house until the spring of 1860. In January, 1860, the plaintiff leased the whole lot to Harvey for one year, and in March, 1860, Holden moved out of the framed house and Harvey moved into and occupied it during the continuance of his lease. In the spring of 1862, while Harvey was in possession of the framed house, the defendant, by the authority of Bates, cut down and carried away from the uninclosed part of the lot six standing trees, for which act this action is brought.

Now it is apparent, from these facts, that Beekman and those claiming under him have been in the actual possession of lot C, claiming title to the whole lot under the comptroller's deed, and so constructively in possession of the whole lot from the date of that deed down to the time of the committing of the trespass complained of in 1862, a period of 28 years. Until 1851 they were in actual possession of the land cleared by Mrs. Turk, by her as their tenant. The possession of Effner & Rockwell, under their contract of purchase, was the possession of Beekman and his devisees. They were quasi tenants of the plaintiff. The possession of the framed house by Samuel Effner, the servant or tenant of Effner & Rockwell, was the possession of the plaintiff, and when Bingham, in 1849, hired Samuel Effner to leave the house, and entered himself and put Burrows in as his tenant, Bingham and Burrows' possession of that house was that of the plaintiff, and Bates and Holden and the defendant, all of whom claimed under Bingham, stood in precisely the same relation to the plaintiff, as to the framed house. They were all in possession under the plaintiff's title, and were estopped to deny his title or to set up an outstanding title in themselves or any other person. The learned referee concedes that Samuel Effner was in possession of the framed house as

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servant or tenant of Effner & Rockwell, but he states that he does not perceive how that fact, and the circumstance of Bingham's hiring him to leave the house, and Bingham's entry into the possession upon Effner's quitting the house, constituted Bingham a tenant of the plaintiff, or an occupant under him. This was the radical error of the referee.

The case is analogous to that of *Jackson ex dem. Livingston v. Walker*, (7 Cowen, 637.) There the lessee of the plaintiff had contracted to sell the premises in question to one Storm, and Storm had entered under the contract. Storm had removed from this state and resided in Ohio, having left his wife and family in possession of the premises. One Garnsey, who claimed title to the premises, hired Storm's wife to quit the premises, and paid three dollars to one Covill, who came into possession of part of the premises under Mrs. Storm, for a surrender of his part. Garnsey entered into possession upon Mrs. Storm's and Covill's leaving, and put the defendant in possession. It was held in that case that Storm could not set up title against his vendor, under whom he entered, and that a claim of title which could not be set up by a person while in possession, cannot be set up by another person who comes into possession under him. And in reference to the manner in which Garnsey acquired the possession, and the effect of it, Woodworth, J., delivering the opinion of the court, speaks thus: "Here Garnsey purchased the possession of Mrs. Storm. If paying her for that possession, inducing her to quit, and then entering himself, is not an entry under the person who contracted with Livingston, or those representing the purchaser from Livingston, I am at a loss to determine what constitutes an entry under another." And again: "If Garnsey did not come in under Storm, or those who represented him, I ask how did he obtain possession? The premises were not vacant. The entry was not by force. The lot was

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in the actual occupation of Storm's family. Did they abandon without a compensation, or concert with Garnsey? The contrary appears. He held out inducements which were successful. The actual possession was worth contending for, in a case where the title was involved in difficulty. But if the title was perfect, much was gained by immediate possession. That was the object sought after, paid for and obtained. After it was obtained, to say nothing was acquired under Storm is to my mind an absurdity. *The plaintiff was entitled to the benefit of Storm's possession thus acquired by the defendant.* It is alike the dictate of justice as of law that the defendant restore it before he can be permitted to show title in himself, or an outstanding title in another."

The remarks are peculiarly applicable to the possession by Bingham, and those claiming under him, of the house upon lot C, in this case. All the occupants, from Effner to Holden, derived their possession mediately or immediately from Beekman, and he and his successors were bound, in justice and in law, to restore their possession to the plaintiff, under whom they held, and who was in the possession of the framed house on the lot. Holden was bound to restore the possession of the framed house to the plaintiff. He was quasi tenant of the plaintiff, and could not set up title in another. It was therefore lawful for him to take, and for the plaintiff to give, a lease of the lot while he held possession under the lease from the defendant. Neither Bingham nor any other party claiming under him could set up title against the plaintiff, if they had any, and the case shows that none of them had the shadow of title. The deed to Bingham having been executed while the lot was held adversely by Effner & Rockwell under the plaintiff, the statute annulled that deed and struck it out of existence. The attornment of Holden, or his surrender of possession when he took a

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lease of the lot from the plaintiff, was not to a stranger, but to the party under whom he held, and as to whom, until such possession was surrendered, neither Holden nor the defendant could set up title in another. They claimed, of necessity, a part of the lot at least, to wit, the framed house, under the plaintiff, and could claim under no other. A continued protestation that they did not claim under the plaintiff would have been of no force. Thus the plaintiff is shown to have been in the actual occupation of a part of the premises covered by the comptroller's deed, from 1834 down to the time of the committing of the trespasses complained of.

I am aware that it appears that Bingham erected a log house upon the lot, and claimed a portion of the land which was actually occupied by him and those claiming under him, the possession of which part of the lot was not acquired by the purchase from Samuel Effner. But the possession of these parts of the lot could not affect the plaintiff's constructive possession of the unoccupied parts of the lot. Where a valid constructive possession of an entire lot is acquired by entry under claim of title founded upon a written instrument, and the actual occupation of a part, it cannot be defeated by a subsequent entry on the same lot by another, who makes an improvement on a part and obtains title to the whole lot. The effect of such subsequent entry would be to give the person so entering a possession of the part actually occupied and improved, but no further. A constructive possession of the unimproved part of the lot would remain in him who made the first entry under claim and color of title, and improved in part. This was held in the case of *Jackson v. Vermilyea*, (6 Cowen, 677, 680.)

The place where the trespasses complained of in this case were committed was uninclosed and unimproved. No one had the actual possession of it. The plaintiff

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alone had the constructive possession of it. It does not appear that Beekman, or any one claiming under him, ever renounced the claim of title to the whole lot after the comptroller's deed was executed.

I have thus far considered the case as though it was necessary that the comptroller's deed should have been accompanied by an adverse holding under it for twenty years, in order to entitle the plaintiff to recover, or that he should have proved the existence of the facts recited in it, giving authority to the comptroller to make the sale in case the grantee's possession was short of twenty years. This latter proof was necessary when the case of *Beekman v. Bigam* was decided, (1 *Seld.* 366.) The learned referee states, in his opinion, that the same objections to the title under the comptroller's deed still exist, and it is evident that he regards the preliminary proof as still necessary in order to give effect to such deed. In this he is mistaken. The act of 1850, (page 657, chap. 298, § 83,) referred to in the opinion of the court in *Beekman v. Finlay*, made the deed of the comptroller, of lands sold by him for taxes, thereafter executed, presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular. Chapter 183 of the laws of 1850 declared the same rule applicable to deeds of the comptroller executed before or after the passage of that act, except in case where the grantee, or those claiming under him, should refuse to release to the owner or occupant of the land upon being tendered the amount paid at tax sale, with interest at ten per cent, and the costs of suit to recover the lands. It is unnecessary to decide whether this last act was repealed by section 114 of the first act cited, as it was expressly repealed by section 92 of chapter 427 of the laws of 1855. (*Laws of*

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1855, p. 799.) But section 65 of the act of 1855 made comptrollers' deeds for lands sold for taxes, executed *after the passage of that act*, presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular. This section was amended in 1860, (*Laws of 1860, chap. 209, p. 352,*) by adding thereto, as follows: "But where the person or persons claiming title under such conveyance, or the grantees or assignees of such persons, shall be in possession of the land described therein, either by himself or themselves, or his or their grantees, assignees, agents, tenants or servants, then such conveyance shall be presumptive evidence of the facts above stated, *whatever may be the date of such conveyance.*" This amended section, I think, should be construed as including not only the case of an actual possession of the whole lot covered by the deed, but the constructive possession of the whole, when there is actual possession of a part of the land covered by the deed, with claim of title to the whole. Giving the act this construction, it is clear that the title of the plaintiff was perfect under the comptroller's deed, without proof of any other fact than that he was in possession of a part of the lot C, under the deed claiming title to the whole. This proof he gave, as I have already shown, from the findings of the referee. The plaintiff thus showed title to the *locus in quo*. The alleged trespass was committed as far back as 1834. There being no evidence to affect the presumption mentioned in the statute, there was no adverse title. The assessors may not have known of any subdivision of lot C, and if so, their assessment was correct. (1 *R. S. 5th ed.* 910, § 11. *sub. 2.*) The statute declares the deed presumptive evidence of the regularity of the assessment.

The plaintiff should have had judgment in his favor, upon the facts found by the referee.

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The judgment for the defendant should be reversed, and a new trial ordered, with costs to abide the event, and the reference discharged.

[CLINTON GENERAL TERM, July 11, 1868. *James, Booke* and *Rosekrans*, Justices.]

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Actions for injuries to the person are transitory, and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner, in our courts, for a tort committed in another country, the same as on a contract made in another country.

It is now settled that the courts of this State have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States.

As a question of law, the Supreme Court has jurisdiction of torts committed in a foreign country, between non-resident foreigners; but, as a matter of policy, will only exercise it in its discretion, in exceptional cases.

But where the question arises upon demurrer to a pleading, no papers except the pleadings are properly before the court, and if any special reasons exist for retaining jurisdiction, they would not, and could not, properly appear. The court has power to determine the sufficiency of the pleading only.

Upon a motion to dismiss the complaint, however, the special reasons, if any, for retaining jurisdiction, can be set forth in the opposing affidavits, and the court has a discretion to adjudge whether it will retain jurisdiction of the action or not.

THIS is a demurrer to an answer. The action was for assault and battery, and the answer averred that at the time of committing the tort alleged in the complaint, the plaintiff and defendant were, and still are, subjects of Great Britain, and citizens and residents of Canada, and that the assault and battery complained of was committed in said province. The plaintiff demurred on the ground that the answer did not state facts constituting a defense.

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G. W. Lewis, for the plaintiff.

Cantwell & Beaman, for the defendant.

JAMES, J. Actions for injuries to the person are transitory, and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts for a tort committed in another country, the same as on a contract made in another country.

It is now settled that the courts of this state have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both, or either of the parties, are citizens of the United States. (*Glen v. Hodges*, 9 John. 67. *Smith v. Bull*, 17 Wend. 323. *Lister v. Wright*, 2 Hill, 320. *Johnson v. Dalton*, 1 Cowen, 548.) I am aware that the New York Common Pleas, in *Molony v. Dows*, (8 Abb. 316,) held otherwise; but that case is not regarded as authority in this court. That decision was probably affected by the necessities of the case, overlooking the second section of the fourth article of the constitution of the United States.

The case of *Fabrigas v. Mostyn* (2 Black. 929) is always referred to on this question. In that case Lord Mansfield put, by way of illustration, the case of two Frenchmen fighting in France, and expressed a doubt of the jurisdiction of the courts in England in such case. But the reason given why the court would not have jurisdiction in such case has been held, in this state, not sufficient. (See *McIvor v. McCabe*, 26 How. Pr. 261, and *Gardner v. Thomas*, 14 John. 134.) In the latter case the action was for a tort committed on the high seas, on board a British vessel, both parties being British subjects; it originated in a justice's court, where the plaintiff had judgment. "The court held that although it might take cognizance of torts committed on the high seas, on board foreign vessels, when both parties were foreigners, yet on princi-

Dewitt v. Buchanan.

ples of policy it would often rest in the sound discretion of the court to afford jurisdiction, or not, according to the circumstances of each case." On this ground the judgment of the justice was reversed.

I have been unable to discover any *principle* on which the jurisdiction of the court in such a case as this can be denied; but as a question of policy, there are many reasons why jurisdiction should not be entertained. Unless for special reasons, non-resident foreigners should not be permitted the use of our courts to redress wrongs or enforce contracts, committed or made within their own territory. Our courts are organized and maintained at our own expense, for the use, benefit and protection of our citizens. Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flee to this country, he may be pursued and prosecuted here.

Nothing appears in this case showing why jurisdiction should be entertained. It seems an ordinary case of assault and battery, committed in Canada, both parties still residing there, the defendant being casually here when arrested. It is most clearly against the interests of those living on the border for our courts to encourage or entertain jurisdiction of such actions. To do so would establish a practice which might often be attended with serious disadvantage to persons crossing the border. The true policy is to refuse jurisdiction in all such cases, unless for special reasons shown.

But the case is now before us upon demurrer to the sufficiency of a pleading, not on a motion to dismiss. In the former case the court has power to determine the sufficiency of the pleading only; in the latter case it has a discretion to adjudge whether it will continue jurisdiction of the action or not. In the former, no papers except the pleadings are properly before the court, and if any special reasons exist for retaining jurisdiction, they would not, and could not, properly appear; while in the latter

 Taylor v. Scoville.

case the special reasons, if any, could be set forth in the opposing affidavits.

From the foregoing it will be seen that the demurrer is well taken; that the answer does not set forth facts constituting a defense; that as a question of law this court has jurisdiction of torts committed in a foreign country, between non-resident foreigners; but as a matter of policy will only exercise it in its discretion, in exceptional cases.

There must be judgment for the plaintiff on the demurrer, with costs, with leave to the defendant to amend, or to move to dismiss the complaint on the grounds set forth in the answer.

[FRANKLIN SPECIAL TERM, February 25, 1868. James, Justice.]

 TAYLOR vs. SCOVILLE.

It is doubtful whether an appeal to the Supreme Court can be taken from an order of a county court denying a new trial, until after judgment, and then only in connection with an appeal from the judgment. *Per JAMES, J.*

Where the issue in a justice's court is fraud, and the title to land only collateral—a fact from which the main issue may be inferred—evidence of title in another, instead of the defendant, may be received.

Where the gravamen of an action was that the defendant, by false representations induced the plaintiff to labor for him, under the belief that the defendant was solvent and able to pay the price agreed upon for such work, and stated that he owned the farm, as an evidence of such ability, yet there was no proof of the defendant's insolvency, or inability to pay for such labor, but on the contrary his responsibility affirmatively appeared; *Held* that unless the defendant was insolvent or unable to pay, no fraud was perpetrated upon the plaintiff; and that it was therefore erroneous for the judge to charge that "if the jury found that the defendant was not the owner of the farm, it was a misrepresentation which would justify their finding for the plaintiff;" the assertion of a falsehood as to the defendant's ownership of the farm, of itself producing no injury to the plaintiff.

To entitle a party to recover for fraud or deceit, there must have been an assertion of a falsehood, with a fraudulent design, as to a fact, with a direct and positive injury arising from such assertion.

Taylor v. Scoville.

THIS cause originated in a justice's court. The action was for obtaining work and labor by false and fraudulent representations. The answer was a denial, special agreement and breach, misconduct, negligence, damage, and recoupment.

The representations averred in the complaint were, that at the time of hiring, the defendant represented that he was the owner of a farm, describing it, a brewery, a house of the value of \$1000, and other property; was solvent and worth a large amount of money; that relying upon such statements the plaintiff worked, &c.

On the trial before the justice the plaintiff obtained judgment for \$32.76 damages. The defendant appealed, and the cause was tried in the county court, before a jury, who rendered a special verdict "for the plaintiff (on the misrepresentations of the defendant in regard to his owning a farm) for \$22.75." On the coming in of the verdict the defendant moved for a new trial on the minutes, which was denied.

The defendant appealed from the order denying a new trial, before judgment, which is the case now before us.

L. Varney, for the appellant.

Davis & Harris, for the respondent.

By the Court, JAMES, J. The grounds on which a new trial was asked do not appear in the motion or the case. The appellate court ought to be informed of the grounds of a motion, the determination of which it is asked to review and reverse. Why did the defendant move for a new trial? For aught that appears, it may have been for some irregularity in impanneling the jury; or it may have been upon exceptions, or for insufficient evidence, or excessive damages; as we are not informed, we cannot know unless it can be spelled out from the case.

Taylor v. Scoville.

The case contains several exceptions to the reception and rejection of evidence, and to the charge, and refusal to charge, of the court. These questions could be more properly presented and reviewed on an appeal from the judgment. It is doubtful if an appeal to this court can be taken from an order of a county court denying a new trial, until after judgment, and then only in connection with an appeal from the judgment. But as no motion has been made to dismiss the appeal, and no objection taken to its being heard and considered, it is best that it be now disposed of.

There was no force in the position that the title to real property came in question, by the plaintiff's own showing, whereby the justice was ousted of his jurisdiction, as defined by the Code, § 59. The issue in this case was fraud; the title to the farm was only collateral, a fact from which the main issue might be inferred, and therefore the evidence of title in another, instead of the defendant, was properly received. (*Nichols v. Bain*, 42 Barb. 353. *Burkham v. Nutt*, MS.)

It was urged that the defendant's presumptive title to the farm arising from actual possession was not overcome by the deed to the defendant's wife, because it did not appear that her grantor had title. But as that objection is one which might, perhaps, have been obviated if taken on the trial, and was not, it cannot be raised here.

The learned county judge, among other things, charged the jury as follows: "The plaintiff had the means of knowing whether the representations that the defendant owned a brewery and a house worth \$1000, when he commenced work, were true; but if they found the plaintiff had no means of knowing the representation that the defendant was the owner of the farm was true, and if they found from the evidence that the defendant did state to the plaintiff, at the time of hiring, that he was the owner of the farm upon which he resided, and that he was not the

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owner of said farm, it was a misrepresentation to the plaintiff, and they would be justified in finding for the plaintiff on that ground alone." The latter part of this charge was duly excepted to. The finding of the jury was based on the law as thus stated.

This charge was erroneous in more particulars than one. The gravamen of the action was that the defendant, by false representations, induced the plaintiff to labor for him under the belief that the defendant was solvent and able to pay the price agreed upon for such work, and stated that he owned the farm, as one evidence of such ability; and yet there was no evidence of the defendant's insolvency, or inability to pay for such labor. On the contrary, from the property shown in his possession, his responsibility affirmatively appeared. Unless insolvent, or unable to pay, no fraud was perpetrated upon the plaintiff. To entitle a party to recover for fraud or deceit, there must have been an assertion of a falsehood, with a fraudulent design, as to a fact, with a direct and positive injury arising from such assertion. The assertion of a falsehood as to the defendant's ownership of the farm, of itself, produced no injury to the plaintiff. If the defendant paid the plaintiff for his labor, or was able to pay, it was a matter of indifference to the plaintiff whether the defendant, or his wife, had title to the farm. Therefore the county judge erred in charging that "if the jury found that the defendant was not the owner of the farm, it was a misrepresentation which would justify their finding for the plaintiff."

For this error the order of the county court must be reversed, and a new trial ordered in the county court, with costs to abide the event.

[ST. LAWRENCE GENERAL TERM, October 27, 1868. *James, Roskrans, Potter and Beckes*, Justices.]

THE PEOPLE, *ex rel.* Ramon S. La Torre, *vs.* JAMES O'BRIEN,
Sheriff, &c.

A debtor imprisoned on proceedings under the act of 1831, "to abolish imprisonment for debt" &c., cannot be discharged from imprisonment under the provisions of the Revised Statutes, relative to "Proceedings by creditors, to compel assignments" by imprisoned debtors. (2 R. S. 24, §§ 13 to 16.)

APPEAL from an order made by a justice of this court denying an application of the relator to be discharged from imprisonment.

The relator was arrested upon a warrant issued under the 4th section of the act of 1831 to abolish imprisonment for debt, (1 R. S. 808, 2d ed.) on the allegation of having fraudulently purchased goods on credit, by means of false representations, and removed them from the state. The allegation having been substantiated, he was committed to jail by the officer before whom the proceedings were had, as directed by the 9th section of the statute. The relator then applied to a judge for and obtained an order discharging his person from imprisonment, under the provisions of the Revised Statutes. (2 R. S. 26, §§ 13 to 16.) The sheriff refused to discharge him, notwithstanding this order. He then applied for a writ of *habeas corpus* to obtain his discharge in pursuance of said order; which application was denied, and he appealed.

Joseph J. Marrin, and others, for the relator.

Brown, Hall & Vanderpoel, for the sheriff.

G. A. Seixas, for the creditor.

CARDOZO, J. The apparent, for there is not any real, difficulty in this matter, seems to arise from the relator's counsel having confined his attention to the 9th section

The People v. O'Brien.

of the act of April 26, 1831, (4 *Edm. Stat.* p. 465,) overlooking or ignoring the 11th section.

The 9th section provides that the final commitment of the defendant shall be to the jail of the county in which the hearing is had, to be there detained until he shall be discharged "according to law." The 11th section points out the "law" according to which the defendant may be discharged. That section provides that the defendant so committed "*shall remain in custody in the same manner as other prisoners on criminal process, until a final judgment shall have been rendered in his favor in the suit prosecuted by the creditor, at whose instance such defendant shall have been committed; or until he shall have assigned his property and obtained his discharge, as provided in the subsequent sections of this act.*" When the act of 1831 declares that the prisoner "shall remain in custody" until discharged according to the sections of that statute, it is preposterous to argue that he could be discharged under the provisions of a prior statute.

The language of section 11 excludes all other remedies, and restricts the defendant's application for discharge to a proceeding under and pursuant to the provisions of that act.

The statute of 1813, re-enacted by the Revised Statutes, (2 *Edm. Stat.*, p. 29,) was therefore inapplicable to the relator's case, and the decision of the learned justice below was clearly right, and his order should be affirmed with costs.

INGRAHAM, J. If the act to abolish imprisonment &c. is to be considered as still operative, I concur in the above opinion affirming the order appealed from. The reason is apparent, viz., that in the proceeding under the 12th section, the assignment is for the benefit of the prosecuting creditor (*Spear v. Wardell*, 1 *N. Y. Rep.* 144;) while

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under the act of which the defendant availed himself, the assignment is for the benefit of all the creditors. The order should be affirmed.

GEO. G. BARNARD, P. J., concurred.

Order affirmed.

[NEW YORK GENERAL TERM, November 2, 1868. *Geo. G. Barnard, Ingraham and Cardoso, Justices.*]

BILLINGS vs. CARVER.

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If service of an order for the defendant to appear before a referee and submit to an examination as to his property, is made without exhibiting to him the original order of the judge, the service is only irregular; not a service which the defendant is at liberty to disregard, but one which he can object to, and have set aside, by appearing and taking the objection. His failure to take the objection is a waiver of it.

While there is no rule or practice which absolutely protects a party from punishment for a violation of an order, committed upon the advice of counsel, yet substantial justice, and the wise exercise of the discretion vested in the court, require it to relieve a party when the effect of his counsel's mistake may be to keep him in jail indefinitely, by reason of his inability to pay a large sum of money.

Accordingly, where a defendant was adjudged guilty of contempt in failing to appear and submit to an examination, as to his property, and it was shown that such failure was caused by the advice of counsel given in good faith and in good faith relied upon by the defendant, the order was modified so as to direct that the defendant be adjudged guilty of the contempt charged, and be fined, unless he appeared and submitted to an examination under the original order, and made an affidavit to the effect that he had made no transfer of his property, since the order for his examination, except and unless under the provisions of the bankrupt act.

A PPEAL from an order made at a special term, adjudging the defendant to be in contempt for not appearing before a referee and submitting to an examination as to his property.

Billings v. Carver.

By the Court, CARDOZO, J. On the papers before us it must be assumed that the service of the order for the defendant to appear and submit to examination as to his property, was made without exhibiting to him the original order of the judge.

If any other papers than the interrogatories and answers were before the justice at special term when the order adjudging the defendant to be in contempt was made, they were not presented to us on this appeal. If there were any such papers, and they would have shown that the point of whether the original order was exhibited or not was the subject of contradictory evidence, the respondent should not have permitted the argument to proceed before us upon defective appeal papers.

But I do not regard the question of whether the evidence was conflicting upon that point as very important. For if it be assumed that it was not so, and that the evidence all showed that the order was not exhibited, still the service would have only been irregular; not one which the defendant was authorized to disregard, but which he could have objected to and had set aside had he appeared and taken that objection. His failure to take the objection was a waiver of it. Of course, if the appeal papers showed that the question of the manner of the service of the original order was the subject of conflicting testimony, we would not disturb the conclusion which the judge reached as to who told the truth. In any view, therefore, it cannot be said that there was any error of law committed by the judge below.

It appears, however, that the defendant disregarded the order, upon the advice of his counsel that he might lawfully do so. This is distinctly sworn to by the defendant, and is uncontradicted, and there is nothing in the appeal papers before us to lead to a doubt either that such advice was given in good faith, but from an erroneous judgment of the law, or that it was in good faith relied upon by the

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defendant. While there is no rule or practice which absolutely protects a party from punishment for a violation of an order committed upon the advice of counsel, yet I think substantial justice, and the wise exercise of the discretion vested in us, require us to relieve the defendant when the effect of his counsel's mistake may be to keep him in jail indefinitely by reason of his inability to pay a large sum of money.

For this reason, I am for modifying the order so that it shall direct that the defendant be adjudged guilty of the contempt charged, and be fined as therein prescribed, unless he appears and submits to examination under the original order upon a day to be designated in the order to be entered on this appeal, and upon his making an affidavit that he has made no transfer of his property since the order for his examination, except and unless under the provisions of the bankrupt act.

[NEW YORK GENERAL TERM, November 2, 1868. *Geo. G. Barnard, Cardoso* and *Ingraham*, Justices.]

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BLATCHFORD vs. ROSS and others.

The articles of association of a company prohibited the union or consolidation of the company with any other, without the consent of a majority of the stockholders. But they contained a clause providing for an amendment of the articles, by a concurrent vote of two thirds of the executive committee and a majority of the trustees. *Held* that the authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. And that such authority to amend should be construed as intended for such amendments as were pertinent to the business and objects for which the association was organized. In such a case, a merger of the company in another, without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors; and if the union has not been

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substantially executed, by a transfer of property, and by a large number of the stockholders, it will be enjoined until the final hearing of the case.

But, so far as a transfer of the property has been *made*, the new company will not be enjoined from the use of the property, or from receiving from any of the stockholders of the old company a surrender of the stock held by them, to the new company, and a voluntary compliance with the terms of the agreement, on their part. And if the stockholders who have not yet accepted of the terms agreed on between the two companies elect to do so, and to become stockholders in the new company, they will not be restrained from so doing; but in regard to property not delivered the injunction will be continued, and the directors and executive committee will be restrained from enforcing any compliance with the terms of consolidation by the plaintiff and other shareholders who are not willing to become members of the new company, by collecting assessments on the shares of stock, or in any other manner, until the decision of the case.

It is no objection to the continuance of the injunction that the company with which the merger is made, and its stockholders, severally, are not made parties to the suit. That company is not in any way interfered with by the proceedings, and its interest, if any, is so remote that it affords no grounds for relief to a plaintiff suing in behalf of himself and others who may choose to come in, and who may not have become stockholders in the new company.

Nor is the failure to make all the stockholders defendants, a good objection to the continuance of the injunction, where they are very numerous, and the defendants who are named represent the executive committee and directors, who are in favor of the union of the two companies, and can litigate for the benefit of the other class.

The executive committee of a company have no right to vote money to themselves, in addition to their regular compensation, for their services as promoters and originators of the company, or in consideration of the members retiring from the executive committee. And if large sums are granted for those purposes, this affords a good reason for the appointment of a receiver.

THIS was a motion to continue an injunction, and to make it permanent. •

T. R. Strong and *E. F. Shepard*, for the plaintiff, in support of the motion.

Robert Sewall, *C. A. Rapallo* and *G. F. Comstock*, for the Merchants' Union Express Company.

Theodore M. Pomeroy, for the trustees.

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H. C. Van Vorst and *John K. Porter*, for the consolidated company,

INGRAHAM, J. This action is brought to restrain the defendants, who are officers of the Merchants' Union Express Company, and that company from carrying out a proposed union and merger of the company with the American Express Company, in the American Merchants' Union Express Company, and for the appointment of a receiver. An injunction was granted, restraining them from making, carrying into effect, or completing any merger or consolidation of the Merchants' Union Express Company with any other company, restraining them from transferring any property to the new company or to any other company, and the new company from receiving any moneys or property from the other corporation, and from enforcing and collecting an assessment on the stock of the Merchants' Union Express Company, which was alleged to be for the purpose of carrying out such consolidation. The injunction also contained some other provisions, which were afterwards modified so as not to interfere with the business of the new company during the litigation.

A motion is now made to make such injunction permanent during the pendency of this action. The main question as to the validity of the proposed consolidation depends upon the construction of the articles of association and the power of the executive committee in altering the same.

I have not been furnished with a copy of the original articles of the association, but I gather from the pleadings that the original articles of association did not allow the union or consolidation of the company with any other, without the consent of a majority of the stockholders. That these articles contain a clause providing for an amendment of the original articles by a concurrent vote of two thirds of the executive committee and a majority

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of the trustees. That by a concurrent vote of the committee and of the trustees, the articles of association were amended so as to provide that the Merchants' Union Express Company might be merged into or consolidated with any other express company, on obtaining the written consent of a majority in interest of the stockholders. That afterward, by a similar proceeding, the articles of association were again amended, so as to provide for such merger or consolidation, without requiring the previous consent of such majority of stockholders. And that in pursuance of such amendment the consolidation of the American and Merchants' Union Express companies was resolved upon, by the trustees and executive committee, without any knowledge or assent of the great body of the stockholders, until after such resolution was adopted.

The authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. Such authority to amend must be construed as intended for such amendments as were pertinent to the business and objects for which the association was organized. As well might the executive committee, under the power of amendment, assume to change the business of the corporation to one entirely different from that for which it has been organized, as to terminate the existence of the association and merge it into another. Such was not the object of the original articles; no such provision was contemplated; and to guard against it the stockholders had expressly provided that their consent should be necessary before any such change could be effected. At any rate, such were the views entertained by the executive committee when the consolidation was first thought of, and in the first amendment the consent of a majority of the stockholders was deemed necessary, but no amendment was contemplated inconsistent with, contrary

Blatchford v. Boas.

to, or destructive of the main objects of the association, and when the executive committee so extended their power they exceeded their authority.

They had no authority, by such a consolidation, to bring the stockholders under the increased liability for the debts of another company, and expose them to "loss" which might not have existed before, or which might follow from the introduction of a new company or association, and a surrender to such new company of all the property of the association. Thus, in the case of private associations, the unanimous voice of the stockholders was regarded necessary to change its provisions. (*Livingston v. Lynch*, 4 John. Ch. Rep. 573.) And even an act of the legislature was held insufficient to compel a change of business, in a corporation, from what was originally contemplated, without the consent of the stockholders. (*Hartford and New Haven Railroad Co. v. Croswell*, 5 Hill, 383.)

In the case of *Church v. Financial Corporations*, (5th vol. Eng. Law Rep., Eq. Cases, 450,) it was held that an agreement for amalgamation with another company was not within the power of the directors, although the articles authorized the directors to amalgamate with any company formed to carry on any business included in the objects of the company, in a case in which an assessment was made upon its stockholders for the purpose of carrying out the amalgamation. In the *Imperial Bank of China v. Bank of Hindostan*, it was held that under the provisions of the act of 1862, (requiring assent of stockholders,) an arrangement for the transfer of the business of the company to another, and providing for an assessment on the shareholders, was not valid, and that assessment of the shareholders must be by all the members. (6th vol. Eng. Law Rep., Eq. Cases, 91.) It is proper, however, to add that although the last two cases referred to are controlled by the provisions of a statute somewhat differing from

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any statute in this state, the general principles in both cases may be well applied to the case under consideration.

Upon this branch of the case I think it is clear that the proposed merger of the company, in another, without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors; and if the union had not been substantially executed by a transfer of property, and by a large number of the stockholders, it should be enjoined until the final hearing of the case.

So far as the transfer of the property has been made, no benefit will accrue to any of the parties to have the new company enjoined from its use, or from receiving from any of the stockholders of the Merchants' Union Express Company a surrender of the stock held by them to the new company, and a voluntary compliance with the terms of the agreement on their part. If the stockholders who have not yet accepted of the terms so agreed on between these companies elect so to do, and to become stockholders in the new company, there is no good reason for restraining them from so doing; but in regard to property not delivered, the injunction should be continued; and the directors and executive committee should be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other shareholders, who are not willing to become members of the new company, by collecting the assessments on the shares of the stock, or in any other manner, until the decision of this case.

It is objected, however, to a continuance of this injunction, that the American Express Company, and the stockholders, severally, are not made parties. That company is not in any way interfered with by these proceedings. Their stockholders are free to become members, and that company is not enjoined from any disposition of its property that may be desired by its managers. The interest

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of the company, if any, is so remote that it affords no grounds for relief to the plaintiff.

Nor is the want of making all the stockholders defendants a good objection. Where they are as numerous as they are in this case, it is not necessary. It is enough if some of the class are parties, who, on behalf of all; may either prosecute or defend. The plaintiff here represents one class, and sues for himself and others who choose to come in, and who have not become stockholders in the new company. The defendants represent the executive committee and directors, who are in favor of the union of the companies, and can litigate for the benefit of the other class. Even if it were otherwise, the means provided for bringing in other parties are such that relief by a temporary injunction should not on that account be denied.

The other branch of this case relates to the appointment of a receiver. This is based mainly on the alleged misconduct of the executive committee in voting for appropriations of money to themselves and others, for services, at various times during the past two years, before and after the organization of the company. These votes are shown by extracts from the minutes of the committee, which at least exhibit very liberal appropriations of the money of the stockholders for their own benefit, large amounts of which are said to be for services prior to the organization of the company. The impropriety of voting such moneys to themselves for extra services, is shown by the cases of *Gardner v. Ogden*, (22 N. Y. Rep. 332,) and *Butts v. Wood*, (37 *id.* 317.) Thus, in April, 1866, \$500 monthly was voted to each of the executive committee and others, which in August was increased to \$700 monthly, to commence on January 1st, 1866. In April, 1867, \$2500 was voted to each member of the committee as compensation for services rendered the company. In May, 1867, an advance was voted to Joslyn & Co. of \$25,000, to

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protect the interests of the company from assaults made by other express companies, and in September, 1867, a further sum of \$40,000. In May, 1866, \$5000 was voted to each member of the committee annually, which in September was reduced to \$2500. In October, 1867, \$8000 was voted to each member of the committee for services for 1866 and 1867, and to be for services in organizing the company. And in December, 1867, to each member of the executive committee and the attorney of the company, \$50,000 for services prior to the organization of the company, in devising ways and means by which the company might be formed, &c., upon condition that each member immediately invest the same in the stock of the company. In May, 1868, the last resolution was repealed, and the treasurer was directed to cancel the indorsement of \$50,000 on the checks of the executive committee, in pursuance of the former appropriation; but whether the stock was or was not issued to the executive committee, under that resolution, does not appear. In May, 1868, a loan to C. T. Backus, of \$20,000, on his notes, for which no cause is stated in the resolution. In May, 1868, a resolution was passed directing the issue to two of the executive committee of 750 shares of stock, and to another of 500 shares, in consideration of their retiring from the executive committee, and as compensation for services as promoters and originators of the company, in addition to compensation previously received.

These resolutions were all passed by the executive committee in their own favor, and it is claimed by the plaintiff that such resolutions are void, and that a receiver is necessary to recover back the same for the benefit of the company. Of the impropriety of grants of such large sums for such purposes there can be little doubt, and in the condition in which this company, the Merchants' Union Express Company, is now placed, there could be

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no impropriety in deciding in favor of the appointment of such receiver.

A receiver was appointed some time since, in regard to the property of the company not involved in the consolidation of the company with the new express company, and the plaintiff has an order allowing him to be made a party to this suit. The order restraining him from parting with any of the funds received by him will protect the plaintiff as fully as if a new receiver were now appointed, and it is but proper that he should be heard after he is brought in as defendant, before any order for a new receiver is made. For this reason, therefore, I reserve any order on this branch of the case, until after the receiver has appeared and answered; the plaintiff may then renew such application in such way as he may be advised.

Objections have been made to the right of the plaintiff to take these proceedings, because he is the holder of stock purchased from one who had assented to the consolidation, and because he had delayed in bringing this action until after the consolidation was partially effected.

If this action was solely for the purpose of preventing the consolidation, there would be force in these objections, but this action is for other purposes. Under the exception as to the consolidation, as above suggested, those stockholders who are willing to do so will be allowed to become stockholders in the new company, and their rights are not interfered with. As to the others, they may have a right to claim from the remaining funds of the company their share of the interest they have in the stock, and to have the right of the appropriations, heretofore referred to, inquired into through a receiver. For such purposes those objections are in no way applicable in opposition to maintaining this action.

Nor is the want of parties as to the American Express Company, or the other stockholders, any ground of objection.

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That company is only interested in carrying out the consolidation, and the same is not interfered with by the injunction, and the other stockholders are not necessarily parties, when they are so numerous, and when they are represented by sufficient of their class to defend the action on their behalf.

The injunction, therefore, is retained as originally modified, with the further modification in permitting such of the stockholders as so claim to exchange their stock for that of the new company, and to pay the assessment thereon, and reserving any decision as to receiver until after the present receiver shall be made a party, and shall file an answer in this action.

[NEW YORK SPECIAL TERM, February 1, 1869. *Ingraham*, Justice.]

ERASTUS CORNING and another vs. JOHN LEWIS and MARY J. LEWIS his wife.

54b	51
65 AD	*545

The separate property of a married woman is not liable for her husband's debts; much less for his torts. . It cannot be charged with a debt fraudulently contracted, without her privity, sanction or adoption, whether such fraud be committed by her husband, or any of her relatives.

Where the husband purchased of the plaintiffs materials for repairing a dwelling-house owned by his wife and situated on her land, upon the false representation that he was the owner of the house and lot, and gave his own note for the amount; his wife not being privy to the transaction, not knowing where, or how, he obtained the materials, and never sanctioning her husband's act, nor promising to pay the debt; *Held* that the wife's separate estate could not be charged with the payment of the debt; although the materials for which it was created were applied to the improvement of such estate.

The case of *Matties v. Lillie* (24 How. Pr. 264) distinguished from the present.

APPPEAL from a judgment entered on the report of a referee. The action was an equity action, brought by the plaintiffs to charge the real estate of the defendant

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Mary J. Lewis with a debt alleged to have been fraudulently contracted by her husband, John Lewis, in the purchase of certain materials (hardware) used in making repairs upon a dwelling-house upon her land. The action was sought to be maintained upon the ground that as the wife's estate had reaped the benefit of these materials, and its value been enhanced by their use, she should respond, in her estate, for their price, although she did not in person contract for them; and also upon the ground that the articles were furnished upon the credit of the estate, they having been sold to the husband upon his representation that he was the owner of the real estate, and having been thus fraudulently procured from the plaintiff, were applied in the repair of the wife's house, with her knowledge and consent, as well as that of her husband.

The referee reported in favor of the plaintiffs, and the defendants appealed.

George W. Cothran, for the appellants.

M. A. Whitney, for the respondents.

By the Court, LAMONT, J. The defendants are husband and wife. The action is brought to charge upon the separate estate of the wife the amount of a bill of goods bought by the defendant John Lewis of the plaintiffs.

So far as the wife, Mary J. Lewis, is concerned, the facts found by the referee to whom this action was referred are as follows: She owned a house and lot at Bowmansville, Erie county, in which she and her husband resided. Her husband repaired the roof of her dwelling, situated on this lot, in 1866, and she knew he was making such repairs, and using materials for the purpose.

The wife did not know the plaintiffs, and never authorized her husband to purchase the materials; nor did she

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know where he obtained them, nor in what manner they were obtained by him.

On these bare facts, the referee decided that the wife's separate estate was chargeable with the plaintiffs' demand against the husband for the materials used.

There is no head of equitable jurisprudence which can be invoked to sustain this judgment. The fact found by the referee, that the husband had been guilty of swindling the plaintiffs in the purchase of these materials, by falsely representing that he owned the house and lot, and gave the plaintiffs his note for the bill, which they were unable by a judgment, execution and supplementary proceedings thereon, to collect of him, does not alter the position of the wife, who knew nothing of these circumstances, and never sanctioned them, nor promised to pay the debt.

The wife's separate estate cannot be charged with a debt fraudulently contracted, without her privity, sanction or adoption, whether such fraud be committed by her husband or any of her relations. Of her separate estate she is the absolute owner, and has the sole disposition exclusive of her husband. Her property is not liable for his debts; much less for his torts.

The wife was ignorant of her husband's transactions in this matter, and he was not her authorized agent. Whether he had paid for these materials or not; whether he was solvent or a bankrupt; where or how he had obtained them, she had no information, and was under no responsibility.

The case of *Mattice v. Lillie*, (24 How. Pr. 264,) upon which the referee relied, in deciding this case, is not an authority for his judgment. In that case the court put their decision on the express ground that the lumber used in improving the wife's separate estate was originally procured by the fraud of the husband, who represented himself to be the owner, with the intent of the wife, at the time of its purchase, that it should be so used; that she was

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aware that the plaintiff sold the lumber in the belief that the husband owned the house; and that she promised to pay for it. The wife, there, was held privy to the whole transaction, of the fraudulent contracting of the debt, from the start, and knew and intended that the lumber should be thus obtained for the express purpose of improving her estate, and adopted the transaction, in all its length and breadth, and promised to make compensation.

This case is entirely barren of these controlling circumstances, and the judgment must be reversed, and a new trial ordered, with costs to abide the event

[ERIE GENERAL TERM, February 8, 1869. *Daniels, Marvin and Lamont, Justices.*]

CLINTON *vs.* EDDY.

To allow a plaintiff, after judgment, to come in, not as a right, but as a favor, and plead the statute of limitations in bar of a counter-claim set up by the defendant in his answer, would not be "in furtherance of justice."

By suffering the action to go on, without setting up the statute, in a reply, the plaintiff will be deemed to have elected to stand upon the other defenses made by him to the counter-claim, on the trial, and should not be allowed to abjure such election.

Under such circumstances, the only proper mode of attacking the judgment is by appeal.

Such an amendment does not come within the terms of either section 178 or section 174 of the Code; and to allow it to be made, after judgment, would be a stretch of the power of amendment.

MOTION by the plaintiff to open a judgment entered against him upon the report of a referee, and for leave to discontinue an appeal to the general term therefrom, and to serve a reply in the action, and for a rehearing before the referee, &c.

James E. Dewey, for the motion.

E. Countryman, opposed.

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PARKER, J. This action was brought to recover upon three several causes of action. 1. Damages for non-attendance of the defendant as a witness for the plaintiff, in an action in this court, in obedience to a subpoena. 2. To recover the plaintiff's share of certain moneys belonging to him and the defendant jointly, which it is alleged were paid over to the defendant in the year 1854. 3. An account against the defendant for board and tuition of the defendant's daughters at the plaintiff's seminary.

The answer denies the material allegations in the complaint, and sets up the statute of limitations to the second cause of action. It also alleges that the plaintiff received the defendant's share of the moneys mentioned in the second cause of action, together with his own, and claims to recover of the plaintiff the defendant's share of said moneys and interest. It also sets up other demands against the plaintiff as an offset, about which there seems to be no controversy.

No reply was put in by the plaintiff to any part of this answer. The cause was referred, and was tried before the referee. On the trial the defendant raised the point that the claim made by him in his answer to recover his share of the moneys therein alleged to have been received by the plaintiff was a counter-claim, and not having been replied to, stood admitted upon the record. This view was controverted by the plaintiff, who insisted that it was not a counter-claim, and required no reply. The referee decided that the defendant's claim did not stand admitted, and allowed both parties to give evidence upon, and litigate, the question whether the transaction in reference to said moneys was as claimed by the plaintiff in the second count of his complaint, or by the defendant in his answer, in respect thereto. The referee, in regard to this question, found, upon the evidence, in favor of the defendant, and allowed him the benefit of his share of the said moneys so received by the plaintiff, being, with interest, the sum of

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\$75.38, which, with other moneys found due from the plaintiff to the defendant, overbalanced the plaintiff's demands, as established upon the trial, by the sum of \$8.10, for which he ordered judgment for the defendant.

Judgment was thereupon perfected, for the defendant, October 1, 1868, and from this judgment the plaintiff, on the 24th day of November, 1868, perfected an appeal to the general term. A motion is now made, by the plaintiff, for an order, upon such terms as may be just, relieving the plaintiff from this judgment, and allowing a reply to be made to said claim of the defendant, thus allowed him as a counter-claim, and referring the case back to the referee to determine, the same as though the reply had been put in by leave of the court, when the question arose upon the trial as to the necessity of a reply, and allowing the testimony as far as taken to stand in full force, and further relieving the plaintiff by allowing him to discontinue his said appeal.

The affidavits on the part of the plaintiff state that when the question was raised by the defendant, upon the trial, whether or not his claim to recover his share of the moneys in which the plaintiff and defendant were jointly interested, and which he alleged had been received by the plaintiff, was a counter-claim requiring a reply, the plaintiff's counsel stated to the referee that if it should be held by the referee that such claim was a counter-claim requiring a reply, he, the plaintiff, would move to be allowed to amend his pleadings, and for leave to put in a reply; and that the referee overruled the defendant's objection to the plaintiff's going into proof upon the second count of his complaint, and said that a reply was unnecessary.

It is therefore insisted that the plaintiff was *mised* by the action of the referee in holding, upon the trial, that no reply was necessary, and yet in his decision giving the defendant the benefit of a demand, as a counter-claim,

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which a reply of the statute of limitations would have prevented.

The defendant's affidavits—after to some extent contradicting the statement that the plaintiff's counsel declared to the referee their intention to move for leave to reply, in case the referee held a reply necessary—go on to state that in submitting the case to the referee, the plaintiff's counsel insisted that the defendant's claim for his share of the moneys received by the plaintiff as aforesaid was barred by the statute of limitations, while the defendant's counsel claimed that the plaintiff could not avail himself of that statute without having pleaded it in a reply. That after the cause was submitted, the referee informed the counsel for both parties that he had concluded to find, upon the facts, in favor of the defendant, but was undecided upon the question of the statute of limitations, and would give both sides an opportunity to be heard on that question, by submitting briefs thereon. That the counsel on both sides accordingly did submit briefs on that point, and, as involved in the inquiry, upon the question whether the defendant's said claim was a counter-claim. The referee, after such arguments, held, as above intimated, that a reply of the statute was necessary in order to the plaintiff's availing himself of it, and although the defendant's claim had not accrued within six years before the commencement of the action, allowed it to him, in the judgment given.

I think the allegation of the plaintiff, that he was misled by the action of the referee, is answered by the fact that before the decision of the question as to the necessity of a reply, to give him the benefit of the statute of limitations, he was notified that the question was an open one and placed with respect to it in the same condition which he occupied before the evidence was closed. If, upon the trial, he was in a condition to move for leave to put in a

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reply, he was still so, upon being informed by the referee that the question as to the necessity of a reply was still open. Then, instead of conceding the necessity of a reply, and taking steps to obtain leave to plead the statute, he denied such necessity, and argued in support of his position before the referee. He does not stand in a position to allege that the action of the referee misled him, so that he was thereby *prevented* from applying for leave to reply, but rather in the position of resting upon the sufficiency of his pleadings, and deliberately submitting his case, with that distinct question, to the decision of the referee.

It seems to me that it would be a stretch of the power of amendment to allow the one now asked for. It does not come within the terms of either section 173 or section 174 of the Code. It is not a case where the plaintiff has been surprised or misled after exercise of ordinary care and skill, nor do I think the amendment asked for is clearly required in order to promote the ends of justice. (8 *How.* 303. 6 *Bosw.* 674.) Each party claimed of the other, before the referee, his share of the money in question; each alleging that the other had received the whole of it. This question was litigated by them, before the referee, *ad libitum*, and he found that the plaintiff had received the whole, and had not paid the defendant his share. To allow the plaintiff now to come in, not as a right, but as a favor, and plead the statute of limitations against the allowance to the defendant of what the referee finds justly due to him, does not seem to me to be "in furtherance of justice." It is to be remembered that the lapse of six years between the accruing of the cause of action, and the commencement of the action, is not a bar to the action, unless the party against whom the cause of action exists chooses to make it so. In suffering the action to go on without replying the statute, he is, on this motion, to be deemed as having elected to stand upon the other defenses

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which he made to the demand, on the trial, and should not now be allowed to abjure such election.

The only proper mode of attacking the judgment is by the appeal which he has taken.

The motion should be denied, with \$10 costs.

[TIOGA SPECIAL TERM, February 15, 1869. *Parker*, Justice.]

CRANSTON vs. PLUMB and others.

A husband, on his separation from his wife, created a trust and supplied a fund (of \$50,000) to be exclusively reserved for her maintenance. By a deed of separation, executed by the husband and his wife, as well as by the trustees, it was stipulated that the fund should be invested in a certain manner, and the proceeds applied to the maintenance of the wife. A portion thereof (\$20,000) was to be kept invested on bond and mortgage during her life. The wife was empowered to dispose, by will, of the whole or any part of the fund which might remain unexpended, at her death. Following a covenant that the husband would permit his wife to live separate and apart from him, and that he would not exercise or claim marital control over her, or interfere with her in any manner, there was a stipulation in the deed that nothing therein contained should preclude the husband from taking all lawful means, should the occasion arise, to compel the performance of the trusts and agreement embraced therein.

Held that the husband had a sufficient legal and equitable interest in the trust fund to authorize him to intervene for its protection, by an action against the wife and trustees, if there was reason to fear that the fund would be diverted from the purpose for which it was provided. *SUTHERLAND*, J. dissented.

Held, also, that if the trust was faithfully executed, the \$20,000 required to be kept invested on bond and mortgage during the life of the wife, would be unexpended at the time of her decease; and as it was possible that the wife might make no disposition of the trust fund, or any portion of it, by will, and the estate of the trustees would, in that event, cease, and whatever should remain unexpended would revert to the husband, as the donor; these circumstances gave him a pecuniary interest in the fund, which justified him in applying to the court for the protection and preservation of the fund, during the life of the wife.

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APPEAL by the defendants from an order made at a special term, directing the appointment of a receiver of trust property; for an injunction to restrain the trustees from making any use or disposition of any part of the trust estate in their hands; and for the appointment of a referee to examine the accounts of the trustees, and inspect and examine the securities in which the trust fund is invested, &c.

The plaintiff alleged, in his complaint, that he and the defendant Augusta Y. Cranston were married at Boston, in the State of Massachusetts, on the 11th day of December, 1838, and ever since have been and now are husband and wife. That differences having arisen between the plaintiff and his said wife, they agreed to live separate and apart from each other, and on or about the 28th day of May, 1863, the plaintiff, in consideration of certain covenants entered into with him by the defendants Plumb and Yale, made provision for the separate maintenance of his wife, the said Augusta Y., in the manner hereinafter stated. That by deed, bearing date the day and year last mentioned, between the said plaintiff, Hiram Cranston, party of the first part, and the defendants, James M. Plumb and Henry C. Yale, parties of the second part, and the defendant, Augusta Y. Cranston, party of the third part, after reciting the existence of differences between the said plaintiff and his wife, the said Augusta, in consequence of which they were living separate and apart from each other; and further reciting that the said Hiram Cranston had agreed with the said parties of the second part to the said deed, in consideration of the covenants on their part in the said indenture contained, to make provision for the separate maintenance of the said Augusta Y., the said plaintiff, in consideration of the covenants on the part of the said parties of the second part, in the said deed contained, did, at the time of the execution thereof, pay to the said Plumb and Yale, parties of the second

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part, the sum of \$50,000 to be held by them during the natural life of the said Augusta Y., upon the trusts and with the powers in the said deed contained, viz: In trust to keep the same invested in the joint names of the said Plumb and Yale, as trustees for the said Augusta Y., in such manner as she should, by writing under her hand, direct or approve; providing that at least \$20,000 thereof shall, at all times during the life of the said Augusta Y., be kept invested on bond and mortgage, on unincumbered real estate in the State of New York, worth at least fifty per cent more than the sum loaned, or in good New York State railroad bonds, and in no other species of securities whatever. The residue of the said sum of \$50,000 to be invested in such securities as the said Augusta Y. should approve in the manner aforesaid. And upon the further trust, to collect the income arising from such investments, and to pay over the same to the said Augusta Y. upon her separate receipt, for her separate use, during her natural life. The said Plumb and Yale, parties of the second part, were by the said deed authorized, upon the written request of the said Augusta Y., to invest not exceeding \$10,000 of said trust fund (other than the \$20,000 for the investment of which the said specific directions were given) in the purchase of a dwelling-house for the said Augusta Y., to be selected by her, and in case of such purchase, the said parties of the second part were directed to take and hold the title thereto, in their joint names as trustees for the said Augusta Y., during her natural life, and permit her to occupy or let the same; and to sell and convey the same, on her written request; and, in case of a sale, to restore the proceeds to the trust fund. The said trustees were further authorized, in their discretion, at any time during the life of the said Augusta Y., to pay over to her, for her separate use, any part of the said principal sum, \$50,000, except the said sum of \$20,000, for the investment of which particular provision was made as

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aforesaid, for which her receipt was to be the sufficient discharge of the said trustees for all sums so paid to her, and as to all such sums so paid over to her, the trusts by the said deed created were to cease. That the said Augusta Y. was authorized to appoint or dispose of, by her last will and testament, the whole or any part of the said trust fund remaining unexpended at the time of her decease, and any real estate or other property into which the said fund, or any part thereof, might have been converted in such manner as she should see fit, not in contravention of any statutes of the State of New York; and the said trustees were directed, on the decease of the said Augusta Y., to pay any part of the trust fund remaining unexpended, and deliver over and convey any property, real or personal, belonging to the said trust, to such person or persons as the said Augusta Y. should, by her last will and testament, have directed and appointed. And the plaintiff, in and by the said deed, covenanted with the parties of the second part, the said Plumb and Yale, that he would at all times thereafter permit the said Augusta Y. to live separate and apart from him, and that he would not exercise or claim marital control over her, or interfere with her in any manner whatever; but it was expressly stipulated that nothing therein contained should preclude the said Hiram Cranston from taking all lawful means, should the occasion arise, to compel the performance of the trusts and agreements in the said deed contained. The said Plumb and Yale, in and by the said deed, in consideration of the payment to them, by the said Hiram Cranston, of the said sum of \$50,000, upon the trusts and with the powers above mentioned, accepted the said trusts, and covenanted faithfully to perform the same. And for the same consideration, the said Plumb and Yale, by the said deed, further covenanted, for themselves, their heirs, executors and administrators, with the said Hiram Cranston, that they, the said Plumb and Yale, would, at all

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times thereafter, save and keep the said Hiram Cranston, his heirs, executors and administrators, harmless and indemnified from and against all debts and liabilities contracted, or which might thereafter be contracted, by the said Augusta Y. Cranston, either in her own name or in the name of the said Hiram Cranston, for necessities or for any cause or thing whatsoever, and from and against all claims and proceedings, by or on behalf of the said Augusta Y., for her maintenance or support, or for alimony, dower, or thirds, and from and against any and all claims and proceedings of every description, by, or on behalf of the said Augusta Yale, against the said Hiram Cranston, or his legal representatives, and from and against all loss, costs, charges and expenses to which the said Hiram Cranston, or his legal representatives, might be put by reason of any such debt or debts, liabilities, claims or proceedings. And the said Plumb and Yale, by the said deed, further covenanted with the said Hiram Cranston for the same consideration, that the said Augusta Y. would, whenever requested by the said Hiram Cranston, his agent or attorney, and without any further compensation, release, under her hand and seal, to any person or persons, to whom the said Hiram Cranston might convey any real estate then owned, or which might thereafter be acquired by him, the inchoate right of dower of the said Augusta Y. in such real estate, and upon the like request would join in and execute any and every conveyance of real estate which should be thereafter made by the said Hiram Cranston; and that upon the decease of the said Hiram Cranston the said Augusta Yale would, if she survived him, release unto his heirs at law, or devisee or devisees, all her right of dower in any real estate of the said Hiram Cranston which might descend or be devised to such heirs at law, devisee or devisees respectively.

That the said Augusta Y., in and by the said deed, and in consideration of the provisions therein made for her

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benefit, covenanted, promised and agreed to, and with the said parties of the second part named in the said deed, the said Plumb and Yale, that she would execute all such releases of dower as the said Hiram Cranston, his assigns, heirs or devisees might require, and would join in and execute any and every conveyance of his real estate which the said Hiram Cranston might make and desire her to join in; and she thereby empowered the said parties of the second part in the said deed named, or the survivor of them, as her attorneys, to execute all such releases of her dower; and she thereby released, assigned and conveyed all her said right of dower in the real estate of the said Hiram Cranston, then owned or thereafter to be acquired by him, unto the said parties of the second part in the said deed named, or the survivor of them, to have and to hold to the use of any purchaser from, or heir, or devisee of the said Hiram Cranston, to whom such real estate might be conveyed or devised by him, or to whom it might descend from him; and that she would not, at any time thereafter, make any claim against the said Hiram Cranston or his legal representatives, for maintenance, support or alimony, or any claim of any description whatever, or incur any debt for which the said Hiram Cranston might become liable, or in any manner subject him to any responsibility, liability or expense on her account.

That the said deed was duly executed by all of the said parties thereto, interchangeably, under their respective hands and seals, and was by each of them duly acknowledged before a notary public in and for the city and county of New York, at the said city, on the 28th day of May, 1863. The complaint further showed, that the plaintiff paid the said sum of \$50,000 to the said trustees, who received the same under and pursuant to the provisions of the said trust deed, and took upon themselves the execution of the said trust. That the said defendants Plumb and Yale have invested the sum of \$20,000 in and

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by the said trust deed directed to be invested on bond and mortgage, secured upon unincumbered real estate in the State of New York, worth fifty per cent above the sum loaned, or in first class bonds of railroads in the State of New York, as the said plaintiff was informed and believed, in an illegal and improper manner, and, to a large extent, on mortgage security of insufficient value. That, as the plaintiff was informed and believed, the sum of about \$10,000, part of the said sum of \$20,000, had been loaned by the said trustees to Mrs. Plumb, the wife of the defendant James M. Plumb, secured by her mortgage upon a dwelling-house and small tract of land situate at Rockaway, in the county of Queens and State of New York. That the premises upon which the said loan to Mrs. Plumb is secured was an insufficient security for the said sum, and upon a forced sale under foreclosure it was doubtful whether it would produce the amount so loaned, as the plaintiff was informed and believed. The complaint further showed, on information and belief, that the sum of \$10,000, also a part of the sum of \$20,000, had been loaned to the defendant Henry C. Yale, secured by his mortgage to the said trustees, upon a house and lot of land situate in 39th street, in the city of New York. That the said loans were made in violation of the duty of said trustees, and were illegal and insufficient securities. That a sum exceeding \$5000 had been drawn from the said trust, and was wholly lost thereto. That the plaintiff was not informed, and could not state in what manner, or upon what security, the remaining portion of the said trust fund had been or is now invested. That the said James M. Plumb was insolvent, and the plaintiff was informed and believed that the defendant Henry C. Yale had sustained heavy losses since the creation of the said trust. That the said trustees are not now good and sufficient in pecuniary ability, for the performance of their covenant with the plaintiff contained in the said trust deed.

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That the said plaintiff had, by his agent, called upon the said trustees for an account, in writing, of the said trust fund, and of the income thereof, and how the same had been applied and invested, but the said trustees had neglected to furnish any such statement or account, and had denied the right of the plaintiff to demand such statement and account.

The plaintiff demanded judgment that the said trustees be adjudged to account as to the manner of the investment of the said trust fund, and the payment of the income thereof, and how and when, and under what circumstance any portion of the principal of the said trust fund had been withdrawn, lost or used, and to what purpose applied. That the trustees might be removed from their said trust, and that a successor, or successors, might be decreed or appointed by the court, and that a receiver might be appointed in the mean time for the purpose of securing the said fund and its proper administration, during the pendency of this action; and for general relief.

The defendants answered separately. The defendant Augusta Y. Cranston alleged in her answer that she and the plaintiff were married on the tenth day of December, A. D. 1838, and ever since have been and are now husband and wife. That she has always been a faithful wife, &c.; that the differences referred to in the complaint were not of her creating; nor has she contributed to their existence; she has never failed to try and remove them; the arrangement expressed in the deed of 28th May, 1863, was acquiesced in and assented to by her in deference to the wishes of her husband, and with implicit confidence in the fulfillment of the agreement on his part therein contained, that he will not interfere with her in any manner whatever, and therefore she says that he ought not to have or maintain this action against her, and also because the trusts, breaches of which are alleged, are trusts for her, in the execution of which he has no interest, and that *all* said

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trusts have been faithfully performed, and the investments referred to in the complaint made with her approval. And because having no child now living, and no counsel from her husband, it is a source of comfort and satisfaction to her that her trustees should be of her family, as they are, and of her choice. The defendant denied that the investment of \$20,000, referred to in the complaint, had been made in an illegal or improper manner, or to any extent on mortgage security of insufficient value. She denied that the premises mortgaged by Mrs. Plumb were an insufficient security for the loan to her; but that she was informed and believed they were worth more than double the amount of the loan, but she had no knowledge or information sufficient to form a belief what amount they would produce upon a forced sale under foreclosure. She avers on information and belief, that the house and lot on 39th street are worth more than double the amount of the loan thereon. That she is advised by her counsel and believes that neither of said loans are illegal, or made in violation of the duty of the trustees, under the circumstances. Upon information and belief, she denies that any thing has been lost to the fund, and avers that all of the principal which has been drawn and all of the income has been faithfully applied to her use. She is informed and believes that said Henry C. Yale is worth more than \$50,000, over and above all his debts and liabilities; that she has no knowledge or information sufficient to form a belief what losses he has incurred, if any, or to what extent, or what pecuniary ability is requisite for the performance of the covenants on the part of her trustees in her behalf with her husband, except in this, that if for them to be liable to him in any sum on account thereof, she must fail in any of her promises or agreements in said deed contained, she says she has kept them all and will ever do so. That she has no knowledge or information sufficient to form a belief as to any other matter in the

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complaint contained. She also insists that the plaintiff cannot have a suit against her depending on the said agreement, and prays to be hence dismissed.

The defendant Yale, by his answer, denied that the sum of \$20,000, specified in the complaint, or any part of the trust fund, has been invested in an illegal or improper manner, or to any extent on mortgage or other security of insufficient value. He denies that the premises on which the loan to Mrs. Plumb is secured are an insufficient security therefor. He avers that they are worth double the amount of the loan, and he is informed and believes they would bring more than the amount of the loan upon a forced sale under foreclosure. And he says that particular investment was made by his co-trustee, James M. Plumb, whom the defendant had suffered to manage that portion of the fund, under the belief which he entertained, and had every reason to entertain, that said Plumb was a freeholder in the State and worth more than \$200,000, over and above all his debts and liabilities; and the defendant alleges that the said investment is perfectly safe and good. And that the house and lot on 39th street, referred to in the complaint, are worth more than \$30,000, and that the amount secured thereon does not exceed \$9000, and the investment was made by the direction and with the approval of the said Augusta Y. Cranston, who lived on the said premises. The defendant denies that \$5000, or any other sum, has been lost to the fund. In addition to the above securities, the defendant held, at the commencement of this action, and now holds, United States bonds of the par value of twenty-three thousand five hundred dollars, (\$23,500,) and of the market value of \$24,685, and cash, one thousand and ninety-six dollars and seventy-four cents, (1096.74,) uninvested, and that the *residue* of the principal has been paid over to her, to her separate use, and all the income has been so paid to her. The defendant alleges that he is a freeholder in this State,

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and worth more than \$50,000, over and above all his debts and liabilities, and is sufficient in pecuniary ability to answer for the trust fund and the performance of the covenants contained in said deed. He denies that the trustees were ever called upon for an account in writing, as alleged, or that they ever neglected to furnish a statement, as alleged; that on the contrary, although they do not admit the right of the plaintiff to demand such a statement or account, they have always been willing, and before the commencement of this action signified to the plaintiff their willingness, to furnish to him sufficient information as to the investment of the principal, also as to the application of the income, and they have ever since been willing to furnish such information. The defendant denies all the other matters in the complaint contained.

Upon the pleadings and affidavits annexed, an order was made at special term, on the 22d of May, 1868, for the defendants to show cause, at special term, on the 27th day of May, 1868, why a receiver of the trust fund mentioned in the complaint should not be appointed, and also why a referee should not be appointed to examine the accounts of the trustees under the trust deed mentioned in the complaint, and to inspect and examine the securities in which the trust fund, or any part thereof, had been invested, and to examine the said trustees, on oath, touching the investment and income of the said trust fund, and the application of the trust fund, and the income thereof, so far as it had been drawn from their hands, and the use and disposition thereof, and how and in what manner the income, or any part of the principal of said fund, had been drawn from the possession of the said trustees; and why such further or other order or relief should not be granted, as to the said court might seem proper.

On the 17th day of July, 1868, an order was made by Justice Ingraham, at special term, directing that the defendants James M. Plumb and Henry C. Yale, trustees,

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&c., deposit all the money, government stocks, bonds and mortgages, and all securities and property in their hands belonging to the trust fund mentioned in the complaint, with the Union Trust Company of the city of New York, after taking off the coupons on the United States bonds due 1st October, 1868, and that the income of the said trust fund should be paid by the said company to the said trustees, Plumb and Yale, as the same should be received, to be by the said trustees paid over to the said Augusta Y. Cranston, according to the terms and provisions of the said trust deed. It was further ordered that Nathaniel Jarvis Jr., Esq., of the city of New York, be and he thereby was appointed a referee, with authority to examine the accounts of the said trustees under the trust deed mentioned in the complaint, and to inspect and examine the securities in which the trust fund, or any part thereof, had been invested, and to examine the said trustees, the defendants Plumb and Yale, on oath, touching the investment and income of the said trust fund, and the application of the trust fund, so far as it had been drawn from their hands, and the use and disposition thereof, and how and in what manner the income, or any part of the principal of said fund, had been drawn from the possession of the said trustees. And it was further ordered, that the said defendants Plumb and Yale do attend before the said referee and submit to the examination, under oath, thereinbefore directed, and that the said referee take the evidence of such witnesses as might be produced before him by the said parties, respecting the said accounts, the investment of the principal, and application of the principal and income of the said trust fund which had been drawn from their hands, and how, and in what manner, and on what authority, the said trustees had used or disposed of the money which had been drawn from the principal of the said trust fund, by the said Augusta Y. Cranston, and that the said referee report the evidence

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and the accounts of the said defendants Plumb and Yale, as trustees, to be taken and stated before him under this order, with his opinion as to the application, use and disposition of the trust fund, or any part thereof, and the uses and purposes for which the principal or any part thereof, as well as the income, had been drawn from or paid out by the said trustees and defendants Plumb and Yale. And it was further ordered that a previous order enjoining and restraining the defendants Plumb and Yale from making any use or disposition of any part of the trust estate in their hands, bearing date on the 27th day of May, 1868; (except that the said order was thereby modified so as to permit the said trustees to pay over the income of the trust fund in their hands to the defendant Mrs. Augusta Y. Cranston,) be, and the same thereby was continued in full force, without prejudice to the delivery of the said fund, or the securities in the hands of the said trustees to the Union Trust Company, as thereinbefore directed. And it was further ordered that the plaintiff's costs of the said motion, fixed at \$10, abide the event of the suit. And it was further ordered that any further provision as to the funds and securities to be deposited in the Trust Company, be reserved until the next special term, on the submission of the referee's report on the account of the trustees.

From this order the defendants appealed.

John J. Townsend, for the appellants. The marriage relation began 10th December, 1838. It still subsists. On 28th May, 1863, it was modified by the separation deed, which operates simply by virtue of the personal covenants of Messrs. Plumb and Yale, trustees for Mrs. Cranston.

I. The plaintiff failed to make out a case for the interference of the court. 1. The letters demanded a change of the trustees; also an account under oath. The reply

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of the trustees was respectful and proper. 2. The trustees violate no duty. Their duty is specific to invest as Mrs. Cranston shall approve. All the investments are safe, and are approved by her. The plaintiff is not a *cestui que trust*. 3. Messrs. Yale and Plumb are specifically authorized to pay over to Mrs. Cranston \$30,000 of the principal. 4. Although Mr. Plumb is insolvent, Mr. Yale is worth more than \$150,000.

II. Some regard should be had to the wishes and the feelings of Mrs. Cranston.

III. The peculiar nature of a separation deed deserves consideration. It does not relieve the wife from any of the ordinary disabilities of coverture. If entered into by husband and wife alone, it is utterly void. It will be enforced only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debt contracted by her. (*Story's Eq. § 1428.*) Says Lord Brougham in *Warrender v. Warrender*, (2 *Clark & Fin.* 527 :) "Then what is the legal value or force of this kind of agreement in our law—absolutely none whatever—in any court whatever, for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract; no damages for its breach; no specific performance; no court, civil or consistorial, can take notice of its existence." (*See also Legard v. Johnson*, 3 *Vesey, jun.*, 352, 359, 361; *Beach v. Beach*, 2 *Hill*, 264; *Mercein v. The People*, 25 *Wend.* 77.) The consequences are: 1. As the lady is incapable of making a contract with her husband, he has no cause of action against her founded on it. But she is an indispensable party to this action, because directly interested. 2. If the agreement is void as to her, and void but for the intervention of her trustees and their covenants, to remove them would sweep away the struc-

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ture. In *Walrond v. Walrond* (1 John. [Eng.] 23) it was said: "I cannot appoint a new trustee in the only mode in which a trustee could be effectually appointed, viz., by ordering the husband to enter into new covenants with a new trustee." Nor could a new trustee be found. 3. Such deeds must stand as contrived, until put an end to by reconciliation. 4. As the lady cannot contract, and the deed is void but for the covenants of the trustees, it follows that the plaintiff has no interest in the fund as security for the fulfillment of the covenants. Whether the fund be spent or not, if she violate her covenants with her trustees, the plaintiff's sole remedy is a personal action against them. Her trustees alone have a right to regard the fund as a security for her performance of her covenants. The plaintiff cannot be even subrogated to the rights of the trustees, for she has performed her covenants, and will continue to perform them.

IV. There is no case of danger to the plaintiff, for the wife has performed her covenants.

V. The plaintiff, having no pecuniary interest, cannot institute any suit. That he is not prompted by solicitude for her welfare, the strange proceedings in Indiana clearly show.

VI. The order is injurious to Mrs. Cranston, because the fund is taken from the possession of her trustees, who act gratuitously, and her right to control the investment and use the fund is interfered with.

Wm. H. Leonard, for the respondent. I. The plaintiff is entitled to intervene for the protection of the fund, and for an accounting. 1. The right is reserved by the terms of the trust deed, when an occasion arises. 2. The covenants of the defendants Plumb and Yale confer upon the plaintiff the right to be deemed a *cestui que trust*, although he is without any right to receive any principal or income

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from the fund, and has no reversionary interest. 3. His interest arises from the liability still resting upon him to provide for the support of his wife. The creation of the trust has not released the plaintiff from his liability. (2 *Bright's Husband and Wife*, p. 19, §§ 26, 30. *Nurse v. Craig*, 2 *New Rep. C. P.* 148, 153. *Hindley v. Westmeath*, 6 *Barn. & Cress.* 200. *Same case*, 13 *Eng. Com. Law*, 141. 9 *Dowl. & Ry.* 351.) 4. The dower right of Mrs. Cranston also continues. It is not extinguished by the ample provision in her favor under the trust deed, and the plaintiff has only to look for indemnity against claims for dower, alimony and support, to the personal responsibility of the trustees, who have covenanted to indemnify him, and to the equitable powers of this court for the preservation of the trust funds. 5. The court would interpose to protect the plaintiff from liability for dower, alimony or the support of the wife out of the trust fund, in case the husband should be subjected to loss in either of these respects. For these reasons the plaintiff has a direct interest in the preservation of the fund during the life of Mrs. Cranston, which entitles him to demand the interposition of the court for that purpose; and to that end the plaintiff can demand an accounting.

II. The defendants Plumb and Yale have been guilty of misconduct in their character of trustees, and should be removed. 1. The mortgage of Mrs. Plumb is an insufficient security. 2. The trustees have suffered \$5000 to be lost to the fund. 3. Yale, one of the trustees, has become a borrower from the trust funds. This he cannot lawfully do. Neither an agent nor trustee can contract or deal with himself, in respect to the subject of his agency or his trust. 4. Both trustees have put their hands into the fund, one in favor of his wife, the other for himself. Plumb cannot sue his wife, so the power of enforcing that security must devolve on Yale alone, and Yale cannot sue himself, and the trust must depend on Plumb for collect-

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ing that money. Thus the fund is deprived of the protection of *both* trustees in respect to these loans. Each trustee might neglect to act against the other when his duty required, in the apprehension that his co-trustee might retaliate. 5. They have refused to account.

III. The order appealed from should be affirmed, with costs.

CLERKE, P. J. I am of opinion that the plaintiff has a sufficient legal and equitable interest in the trust fund to authorize him to intervene for its protection. He created the trust, and supplied the fund, on his separation from his wife, which he intended should be exclusively reserved for her maintenance. If the trustees are in such circumstances, or are acting in such a way, that there is reason to fear that it will be diverted from this purpose, it would be strange if he has not the right to interpose, in order that his intention in creating the trust should not be utterly defeated. In the deed of separation, executed alike by the plaintiff, Mrs. Cranston, and the trustees, it is stipulated that the fund shall be invested in a certain manner, and the proceeds applied to the maintenance of Mrs. Cranston. Are the trustees not responsible to the plaintiff, under this stipulation, and has he not a right to compel them to perform it by resorting, in his own name, to this court for its aid and protection?

Besides, the plaintiff has a pecuniary interest in the preservation of this fund, and in the faithful performance of this trust. To be sure, according to a provision of the deed of separation, Mrs. Cranston is empowered to dispose, by her last will and testament, of the whole or any part of the fund which may remain unexpended at the time of her decease. The whole, or some of it, might be unexpended at the time of her decease. Certainly, if the trust be faithfully executed, twenty thousand dollars, the amount which the trustees stipulate shall be kept invested on bond

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and mortgage on real estate, during her lifetime, will be unexpended on that event. It is possible that she may make no disposition of the trust fund, or any portion of it, by her last will and testament. In that case, whatever may remain unexpended would, undoubtedly, revert to the donor. This is even provided for by statute. "When the purpose for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease," (1 R. S. 730, § 86, *marginal*,) and of course shall revert to the donor.

If it is necessary to add any thing to these considerations, I remark that the deed of separation contains a provision which is quite conclusive. After the covenant that Hiram Cranston (the plaintiff) shall at all times thereafter permit his wife to live separate and apart from him, and that he will not exercise or claim marital control over her, or interfere with her in any manner whatever, it is added that nothing therein contained shall preclude him from taking all lawful means, should the occasion arise, to compel the performance of the trusts and agreement in that instrument contained.

The order should be affirmed, with costs.

GEO. G. BARNARD, J., concurred.

SUTHERLAND, J., (dissenting.) I shall concede, for the purpose of this decision, the right of the plaintiff, by action, to compel the trustees to keep their covenants with him, in the deed of separation, containing the terms upon which he purchased his freedom from his wife, and the *status* or condition of *quasi* bachelorship.

The trustees covenant with the plaintiff to perform all the trusts in the instrument of separation. As to \$20,000 of the trust fund, the instrument specifies the manner in which it is to be invested, and kept invested; and the court can, at the instance of the plaintiff, compel the trust-

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tees to keep it invested as specified in the instrument; and if the mortgages in which the defendants claim the \$20,000 are invested are not such securities as the terms of the trust as to the \$20,000 call for, the court can repudiate them, and compel the trustees to invest \$20,000 as required by the terms of the trust. But as to \$30,000, the residue of the trust fund, the instrument specifies that it shall be invested in the joint names of the trustees, in such manner as *Mrs. Cranston shall, from time to time, by writing under her hand, direct or approve*; and the trustees are expressly authorized and empowered, *in their discretion, at any time*, and from time to time, to pay over to Mrs. Cranston any part of the \$50,000 (the trust fund) except the \$20,000, for the investment of which particular directions had been given.

Now I cannot see how the order appealed from could be made, or how we can affirm the order, without unjustifiably interfering with, or taking away, this discretionary power of the trustees, given to them for the benefit of Mrs. Cranston, to pay her *any part* of the \$30,000 *at any time*.

Even a court of equity cannot make a contract for parties, and certainly a court of equity will not undertake to alter or modify a deed of separation between husband and wife. I do not say that the court could properly have so far controlled the discretion of the trustees as to have ordered them, if the fund was in danger, to pay the \$30,000, or to transfer the securities in which it was invested to *Mrs. Cranston*; but certainly such an order would have been more consistent with the terms of the trust as to the \$30,000, and with the rights of Mrs. Cranston under the deed of separation, than the order which was made.

Moreover, I am not able to discover, from the papers, on what ground, or evidence, the court below determined that the \$30,000, or so much thereof as had not been paid to Mrs. Cranston, was not invested according to the terms of the trust as to it, and *as she had directed and approved*;

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and if it was, I cannot see what right the plaintiff had to call upon the court to make any order or take any action as to the \$30,000.

I will add, that the order not only in effect, but in words, restrains the trustees from making any disposition of the trust fund, (except income,) though the plaintiff, by the trust instrument, expressly authorized them in their discretion to pay to Mrs. Cranston, *at any time*, any part of it, except \$20,000 thereof. I do not see how the court could take away this discretionary power for the benefit of Mrs. Cranston, resting on the contract of the parties, which is assumed to be valid.

I think the order appealed from should be reversed, with costs.

Order affirmed.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clerke, Sutherland and Geo. G. Barnard*, Justices.]

DRAKE *vs.* GOODRIDGE.

CLARKE *vs.* THE SAME.

The notice, accompanying an attachment, to be served by the sheriff on a third person who is in possession of property claimed to belong to the debtor, may describe the property in general terms, without specifying its precise nature and amount.

This point, which was so decided at special term, in *Greenleaf v. Mumford*, (19 *Abb.* 469,) was not considered by the general term, in that case, on appeal, nor was the ruling of the special term in respect to it overruled.

A PPEALS from orders made at a special term setting aside attachments.

CLERKE, P. J. The notice, served by the sheriff, under the attachment in the first of these actions, on the National Bank of the Republic, is of the same general description, and nearly in the same words, as the notice served on the

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Nassau National Bank, in *Greenleaf v. Mumford*, (19 Abb. 469,) in which I held the notice was sufficient. I deemed it unnecessary and impracticable, in many cases, to specify the precise nature and amount of the property. I should have no hesitation in reiterating this holding, in the present case, if, in the review of my judgment by the general term, in that case, this was one of the grounds of reversal. The opinion of the general term, however, expressly states that the main question in the case was not as to the regularity or sufficiency of the service of the attachment; but the main question was, do the facts found show that there was any debt, fund or thing which was or could be attached or levied on; and the opinion proceeds to maintain that there was no debt, fund or thing which could have been attached or levied upon—a question, by the way, if I recollect rightly, not raised before me at the special term.

I think, therefore, the precise question presented in the case now before us, and which I decided specifically in *Greenleaf v. Mumford*, was not considered; and my ruling in relation to it has not been overruled by the general term. It is unnecessary to repeat the reasons upon which that ruling was founded. They are still as conclusive, to my mind, as they were when I wrote the opinion to which I have referred.

The orders should be reversed, with costs.

GEO. G. BARNARD, J., concurred.

SUTHERLAND, J. I dissent. I am clearly of the opinion that both orders should be affirmed.

Orders reversed.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clark, Sutherland and Geo. G. Barnard, Justices.*]

JAMES SUTTON and ALLEN SUTTON, adm'rs &c., vs. JOSEPH
F. CROSBY.

S. sold and sent to O. a quantity of liquors, under an agreement that if O. sold out his hotel he might send back the unsold liquors to S. O., after having sold only a small portion of the liquors, sold his hotel, and sent the balance of the liquors to the railroad depot, to be shipped back to S. While they were still at the depot, marked and directed to S., they were seized by the defendant, as sheriff, upon an attachment against the property of O. *Held* that even assuming that the title passed to O. on the delivery of the goods to him, the delivery of the liquors at the depot, for reshipment to the vendor, in pursuance of the original contract, reinvested the latter with the title.

Held, also, that the assent of the vendor to receive back the property in case the purchaser should sell his hotel, made the delivery of the property to the carrier, for the purpose of returning the same to the vendor, valid and effectual to reinvest S. with the title, as upon a resale of the liquors.

A bill of sale, containing a description of the goods sold, such as is generally furnished by vendors, is not conclusive as to the terms upon which the goods were sold. Though *prima facie* evidence of a sale, it does not preclude the vendor from showing the actual facts respecting such sale.

ALFRED SUTTON, the plaintiffs' intestate, was a large dealer in liquors at Scranton, Pennsylvania. One Nelson Oldfield was the proprietor of a hotel at Bellona, Yates county. In the month of February, 1865, one Peters, the traveling agent of Sutton, in this State, was at Bellona, and Oldfield wanted some liquors, but did not know how much he wanted, as he talked of selling out, and wanted a supply until he did so; it was then agreed between Peters and Oldfield that Peters would send to Oldfield what liquors he wanted, (Oldfield naming the kinds and quantities,) and Oldfield was to keep track of what he sold, and if he sold out he was to ship back to Sutton at Scranton what was left, or sell them and take a good note for them and send it to Sutton, and to pay for what he had used. Peters then returned to Scranton and the order was filled by Sutton, and the liquors were accordingly sent—sent in pursuance of the agreement with Peters. Sutton, however, sent by mail a bill

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of the liquors, using a common printed bill-head in which was printed the words, "Bought of A. Sutton"—and the blank just above those words was filled by the words, "Nelson Oldfield," in writing. The bill was not signed. It set forth the several items, as "1 barrel of rye whisky, $\frac{1}{2}$ barrel of whisky" &c., stating the price of each package separately. The plaintiffs claimed that at the bottom thereof was written, in substance, that "above liquors shipped in good order in pursuance of the agreement made with Peters." There was some conflict of evidence as to whether the bill of sale contained this clause or not. Oldfield did sell out on April 1st, 1865, and having sold but a small portion of the liquors, he caused the balance—the liquors in question—to be shipped back to Sutton in pursuance of the agreement with Peters. He caused the same to be taken to the depot at Penn Yan, where they were marked to "A. Sutton, Scranton, Pa.," and left in the depot of the Erie Railroad Company with directions to ship them to him, and a receipt given by the company's agent. On the next day they were seized by the defendant, who was sheriff of Yates county, upon an attachment issued against Nelson Oldfield, in an action brought by Martha A. Garlinghouse, and they were sold. For that conversion this action was brought by Alfred Sutton in his lifetime, and upon his death, pending the suit, his administrators were substituted as plaintiffs. The action was tried before Justice WELLES and a jury at the Yates circuit, in March, 1867.

The plaintiff, on resting his case, requested the court to order a verdict in his favor for the value of said liquors and the interest, \$27.88, amounting in all to \$230.50. To which request the defendant's counsel objected, and requested the court to submit the question to the jury whether the agreement was contained in the bill of sale. This request of the defendant was overruled by the court, and the court held that the plaintiff was entitled to recover

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without respect to the question whether any thing of the kind was contained in the bill of sale, and ordered a verdict for the plaintiff for the sum of \$230.50. To which decision and ruling of the court the defendant's counsel excepted. Whereupon it was ordered that there be a stay of proceedings upon the said verdict for forty days, to enable the defendant's counsel to make and serve a proposed case or bill of exceptions, and the like time be granted to the plaintiffs to propose amendments thereto, and that the said case be heard in the first instance at the general term of this court.

Edwin Hicks, for the appellants. I. The liquors were not received by Oldfield as a bailment, nor in any event was it a good conditional contract. The title passed to Oldfield absolutely and unconditionally. (*Ludden v. Hazen*, 31 Barb. 650.)

II. The contract was contained in the bill of sale. It was properly signed. The names of the parties sufficiently appear. (*Merritt v. Olason*, 12 John. 102. *Olason v. Bailey*, 14 id. 484. *Bonesteel v. Flack*, 41 Barb. 435.)

III. The contract was in writing, and parol evidence to vary its terms was improperly received. The ruling of the court, admitting parol evidence of the contract, was erroneous. (*Bonesteel v. Flack*, 41 Barb. 435—more fully reported, 27 How. 310.)

IV. The possession of the property by Oldfield was entirely inconsistent with the continued ownership of the vendors, and was fraudulent as against creditors. (31 Barb. 650. 41 id. 435.)

V. The delivery of the property by the judgment creditor to the carrier did not divest him of title, nor convey title to the plaintiff. (3 Hill, 141.) The case in 24 N. Y. Rep. 538 (*Sturtevant v. Orser*) is entirely unlike this in facts and in principle.

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Smith & Hill, for the respondents. I. There is really but one question in this case. That is, is the bill of liquors which was sent by Sutton to Oldfield, by mail, a contract, under the circumstances proven in this case? We insist that it is not. 1st. It was not signed. 2d. It does not purport to be a contract. 3d. It was not intended to be one. If it is one, it became such by accident, and not by design. The circumstances surrounding the transaction show what was intended. The whole bargain was made previously with Peters. It is uncontradicted and proved by the testimony of Oldfield himself, that the liquors were sent to him in pursuance of the agreement he made with Peters, and that he returned them to Sutton in pursuance of that agreement also. The parties never for a moment thought that by the "bill of liquors" they had made a new contract. The paper lacks all the essential elements of a contract. There are no stipulations in it whatever. The only words of purchase or sale it contains are, "Nelson Oldfield bought of A. Sutton," and they are but the admission of a fact, and not an undertaking. The paper does not, by its own force, at the time it is made, vend the liquors, or assume to do so. It admits that a sale has been had, but does not effect one. We concede that the liquors were sold to Oldfield, but we insist it was a sale under certain conditions. We therefore admit all that can be claimed the paper shows, to wit, the fact of a past sale. The only case to be found in the books, which assumes to hold that such a paper constitutes a contract, is *Bonesteel v. Flack*, (41 Barb. 435.) But even in that case it is held that it can only be construed as such "when read in connection with the fact that the property was delivered under it." It therefore cannot help the defendant here, because in this case it is conceded that the liquors were not delivered under the writing, but under and in pursuance of the parol agreement with Peters. In *Allen v. Pink*, (4 Mees. & Welsb. 140,) a paper which was delivered to

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the plaintiff when he paid the sum agreed upon for the price of a horse, viz., "Bought of G. Pink, a horse, for the sum of £7 2s. 6d., G. Pink," was held not to be the contract of the parties for the sale of the horse. But the Court of Appeals have decided this very question. They hold that such a paper containing the words "bought of" is not of itself such a writing or contract as to preclude proof by parol of the actual contract between the parties. (*Filkins v. Whyland*, 24 N. Y. Rep. 338.) 1. But the evidence of the parol agreement does not contradict the writing. The writing, at most, shows merely a sale of the liquors. It is no contradiction of it, but entirely consistent with it, that in a certain event the liquors were to be returned or purchased back. A contract may rest partly in writing and partly in parol. In all such cases parol evidence is admissible to supply the deficiency in the writing. (25 Wend. 417. 3 Hill, 171-176. 2 Hilton, 184.) In this case—with the exception of the fact of the admission that Oldfield had "bought" the liquors—all the facts of the transaction rested in parol. All the stipulations in reference to the time and manner of payment, and of the delivery of the goods, and the usual conditions incidental to every contract, were contained, not in the writing, but in the verbal agreement. If proved at all they must be proved by parol. 2. The parol agreement was fully executed. Admit that the goods could have been legally seized while they remained in Oldfield's possession, yet the very moment they were returned to Sutton in pursuance of the oral agreement, the title thereto reverted back to Sutton. A parol agreement fully executed by the parties thereto can always be proved. It is binding upon both parties, and justifies all acts done under it. This case differs from the one in 41 Barb. 435, (relied upon by the defendant,) in this: that there the goods were seized while in the landlord's possession, and here they had been surrendered back to Sutton, and were in his pos-

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session when they were seized. It will not be denied but that when the liquors were put in the depot of the Erie Railway Company, marked to Sutton, and with directions to be shipped to him, and were receipted by the company, that then Sutton virtually had the possession of the liquors. The company was then his agent, and its possession was his possession. A delivery to the common carrier was a delivery to him. (3 *Hill*, 141. 14 *Wend.* 546. 2 *Hill*, 137. 2 *Abb. Pr.* 282. 6 *Wend.* 401. 3 *Campb.* 524.) They then were at Sutton's risk. Suppose they had been burned while at the depot on the night of April 7th, 1865, whose loss would it have been? Clearly Sutton would have suffered the loss, because the title was in him. Suppose they had been lost on the route, could Oldfield have maintained an action against the company? Or if burned at the depot, could Sutton have sued Oldfield and made him pay for the liquors thus burned? Most certainly not. 3. But the evidence of the actual contract made by Sutton's agent was admissible for another reason. As stated above, the property was taken from Sutton's possession. He thus had, *prima facie*, the title. He had the right to show how he came by the possession, to fortify his *prima facie* title, by showing that he acquired it by virtue of an agreement between him and Oldfield which had been fully executed. Admit that there had been an absolute sale to Oldfield, it was nevertheless competent to show that Oldfield had sold back the liquors to Sutton, or that Sutton had taken them back by his consent. This was what the evidence proved. There being no pretense of fraud about the transfer, Oldfield had the undoubted right to make a new agreement with Sutton, and to sell him back the liquors; and it could make no difference whether the selling back or taking back of the liquors was in pursuance of a new contract made at the time, or a previous one made when they were first sold. In either case Sutton became again vested with the title. The fact that they were actually taken

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back before a seizure was made, is the important point. Besides, the evidence was admissible as part of the *res gestæ* of the whole transaction.

II. There was nothing for the jury. It is conceded by the defendant that if it was stated at the bottom of the bill of liquors that "above liquors, shipped in good order, as per agreement with Peters," then there was no defense to this action. Whether or not that was contained in the bill, was the only question which the defendant asked to be submitted to the jury. Peters, the agent, was at Scranton when the liquors were shipped, and saw the bill; he swears positively that the above statement was at the foot of the bill. Charles Lewis, another witness, who saw and read the bill at the time of its receipt, swears that it contained the above statement, or words in substance to the same effect. It is true he says, upon his cross-examination, that he had stated he did not recollect what the bill contained; but it seems upon his attention being called to the subject, and after hearing the transaction related by the other witnesses, his memory is refreshed, and he does recollect it, and swears positively about it. That he had forgotten a part that the bill contained does not in any way contradict his evidence. Then they produce the witness to whom Lewis made the admission, and he says Lewis said to him that "it appeared to him there was something, (at the bottom of the bill,) but he could not tell certain whether there was or not." We submit that here was really no contradiction. It might affect the weight to be given his evidence, but the fact was proved, nevertheless. There can be no "conflict" of evidence or "question of fact" in a case where there is no contradictory evidence about the same facts. No one disputes these witnesses. There is not a particle of evidence that the bill did not contain that statement at the bottom of it. No one swears it was not there, and two witnesses who are unimpeached and entirely worthy of credit swear

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positively that it was there. Besides, all the probabilities of the case tend to prove that it was likely to be put there. A jury are not at liberty to disregard the evidence of even one unimpeached witness whose testimony is uncontradicted; and a verdict against such evidence would be set aside by the court. (1 *Cowen*, 109. 10 *How. Pr.* 528.) A new trial will not be granted for the refusal to submit certain evidence to the jury, where, if the jury had found contrary thereto, the court would be obliged to set aside the verdict as against evidence.

III. There is another ground upon which the decision can be sustained. Oldfield, it seems, about the time he sold out his tavern and returned the plaintiff's liquors, had become insolvent. According to the defendant's own showing, Oldfield had himself so declared. Ascertaining his insolvency, he returned the liquor in question to Sutton. Now even if there had been no previous agreement in reference to its return, this act of returning the liquor under those circumstances operated as a rescission of the contract of sale. The Court of Appeals have so decided. (*Sturtevant v. Orser*, 24 *N. Y. Rep.* 538, a case directly in point.) Of course, as decided in above case, the vendor must assent to the rescission. In this case Sutton's assent was clear enough, as he had, by his agent, previously consented and agreed to rescind and take back the goods.

By the Court, E. DARWIN SMITH, J. The disposition made of this case at the circuit, I think, was entirely correct.

Three witnesses, Sears, Peters and Oldfield, testified that the liquors were sold and sent to Oldfield, under an agreement that if he sold out his hotel he might send back the unsold liquors to the vendors whom the plaintiff represents. Peters says the agreement was that "if he sold out he was to ship them or sell them, and take a

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good note and send it to Sutton, and that the liquors were shipped in pursuance of this agreement. Oldfield says he shipped the liquors back in pursuance of this agreement made with Peters. The liquors were sent to the railroad depot, to be sent back to Sutton, before they were seized by the defendant.

The delivery of the liquors at the depot for reshipment to the vendor reinvested him with the title to the goods, even assuming that the title passed on the delivery of the goods by Sutton to Oldfield.

There is no contradiction of the testimony of Peters and Oldfield in regard to the original contract, and it must, therefore, be assumed to be true. The redelivery was therefore in pursuance of the original contract, and clearly changed the title, within the case of *Sturtevant v. Orser*, (24 N. Y. Rep. 538.) The assent of the vendor to receive back the property in case Oldfield sold out, made such delivery valid and effectual to vest the title as upon resale of the property.

The bill of particulars which accompanied the goods from Sutton to Oldfield does not, as I can see, affect this question. It was a description of the goods, such as is generally furnished by vendors, and is not conclusive on the question upon what terms the goods were sold. It is doubtless *prima facie* evidence of a sale, but it does not preclude the vendor from showing the actual facts respecting such sale. But giving it the fullest effect, I think the election of Oldfield to return the goods not paid for, and his delivery of them to the carrier for that purpose, reinvested Sutton with title to the goods, within the case of *Sturtevant v. Orser*, (*supra*.)

A new trial should, therefore, be denied, and judgment given for the plaintiff.

New trial denied.

[MONROE GENERAL TERM, March 1, 1869. E. D. Smith, Johnson and J. C. Smith, Justices.]

WARD and others vs. PERRIN.

At the time a promissory note was made, the maker and indorser both resided in Rochester, at which place the note was dated, and it was discounted at the plaintiffs' bank, which was also located there, and where the plaintiffs resided. *Held* that the plaintiffs had the right, when the note matured, to assume that the indorser still resided in Rochester, and to act accordingly in taking the requisite steps to charge him as such, unless they knew that in the meantime he had changed his residence.

Held, also, that the information on that point, possessed by the notary who protested the note, must be deemed information possessed also by the holder of the paper, at the time of its maturity.

And the notary having demanded payment of the note, properly, and given the proper notice to charge the indorser, by addressing it to him at Rochester, and depositing it in the post-office there, so addressed, with the postage prepaid; *Held*, that the indorser was clearly charged and duly fixed as such, unless the plaintiffs, or the notary, knew that he did not then reside in Rochester, but had, during the time the note was running to maturity, removed to another place.

And that question having been fairly submitted to the jury, who found for the plaintiffs expressly on that issue, it was *held* that this was entirely conclusive.

MOTION by the defendant for a new trial. The action is on a promissory note against the defendant as indorser. The defense was that the indorser was never properly charged. The note is dated December 26, 1865, at four months. At the time when the note was made, and until the 23d or 24th of February, 1866, the defendant resided and did business in Rochester. About that time he removed his place of residence to Bergen, Genesee county, where he received his mail matter. The defendant was a man having no family. Payment of the note was demanded and refused. Notice of the demand and non-payment was served by mail, addressed to the defendant at Rochester. On the trial at the circuit, the defendant gave evidence tending to show that the notary had actual notice of his change of residence. This was denied by the notary. The defendant also gave evidence which his counsel claimed tended to show, inferentially, that the notary had notice of such change of residence.

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This was submitted to the jury under proper instructions. The plaintiffs claimed that the notice was actually duly received by the defendant. At the close of the proofs, the defendant claimed that the evidence was insufficient to authorize a recovery, and moved a dismissal of the complaint, which the court denied, and exception was taken. He also contended that there was no question of fact for the jury, and moved that the court direct a verdict in his favor, but the court decided otherwise and refused to direct a verdict as requested, and exceptions were duly taken. Exceptions were also taken by the defendant to the admission of certain testimony.

The court directed the jury, in addition to rendering a general verdict, to find, upon questions of fact:

First. Did the defendant, in fact, receive the notice of protest which the notary testifies was deposited in the Rochester office?

Second. Was actual notice of the defendant's change of residence given to the plaintiffs before the note was protested, as testified to by the notary?

Third. Do the jury find that such notice was given to the plaintiffs by inference?

That if they were satisfied by the evidence that the notice which was deposited in Rochester was forwarded to Bergen by due course of mail, and there received by the defendant, that would be sufficient notice of protest.

And thereupon the judge, under objection on the part of the defendant, submitted to the jury, in writing, the above three several questions of fact.

The defendant's counsel excepted to that portion of the charge which stated that if the holders of the note had no notice of the change of residence of the indorser at or before the time the note matured, and if they had no reason to suspect the change, they were not required to make any inquiries, and that the depositing of the protest in the Rochester post-office was sufficient; also to that portion

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of the charge which stated that although the defendant should establish the fact of a change of residence before or after the time of the maturity of the note, unless that fact was communicated or a knowledge of that fact was communicated to the holders of the note or to the notary at the time of the protest, they would not be required to make any inquiries as to his place of residence. The defendant also excepted to the submitting each of the three questions of fact to the jury. Also, to the charge that the testimony would warrant the jury in finding that the notice was forwarded and received by the defendant at Bergen. Also, that if the holders had no notice, actual or implied, of change of residence, they were not bound to make inquiry. Also, to the charge that the facts and circumstances tending to show change of residence, were insufficient to charge the plaintiffs with notice, unless brought home to their knowledge.

The jury thereupon found a verdict for the plaintiffs for \$581.25, and also answered the questions put to them by the judge, in writing, as follows:

1st. Did the defendant, in fact, receive the notice of protest which the notary testified was deposited in the Rochester post-office?

The jury answered in the affirmative.

2d. Was actual notice of the defendant's change of residence given to the plaintiffs before the note was protested, as testified to by the notary?

The jury answered in the negative.

3d. Do the jury, as an inference from the facts and circumstances proved, find that such notice was given to the plaintiffs?

The jury answered in the negative.

Whereupon the court, on motion, allowed the defendant forty days' time within which to make and serve a case containing exceptions, on which to move for a new trial, to be heard at the general term in the first instance, and

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permitted judgment to be entered upon the verdict in the meantime.

W. F. Cogswell, for the plaintiff. I. The exceptions taken by the defendant, at folios 72-74, and 76 and 80, were none of them well taken. The defendant gave evidence that in April, 1866, the notary knew that the defendant's residence had been changed. The evidence received at the folios indicated was to show that this was not true, and to show when the notary in fact first received information of such change.

II. The charge of the judge was a very full and correct exposition of the law. The law of 1835 (*ch. 141, § 1*) gives the right to serve notice by mail, directed to the city or town where the indorser resided at the time of indorsing the bill. The law of 1857 (*ch. 416, § 3*) extends this right of service by mail to the case of parties residing in the same city or town where the note or bill falls due. These statutes will be found in the General Statutes by Edmonds, vol. 4, pages 455 and 458, respectively. In *The Bank of Utica v. Phillips*, (3 *Wend.* 408,) it was held, that "Notice to an indorser of the non-payment of a note, sent to the place where he resided at the time of the discount of the note, is sufficient to charge him, although intermediate that time and the maturity of the note he has changed his place of abode. Inquiry as to the residence of an indorser is not necessary where the holder has reason to believe that he knows his place of abode." See also, to the same effect, *Bank of Utica v. Davidson*, (5 *Wend.* 587.) The language of the charge is not accurately stated in the exception, and the mistake should not be made of letting the counsel frame the charge, instead of the court.

Newton & Ripson, for the defendant. I. The defendant was not properly charged as indorser. We have two statutes in this State regarding the mode of charging an

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indorser. The first is chapter 141, section 1, Laws of 1835, and chapter 416, section 3, Laws of 1857. The former statute declares that "in all cases where the notice might be given *by sending the same by mail*, it is sufficient to direct the notice at the place where the party resided at the time of indorsing," unless he had specified where notice should be sent. Under this statute, notice by mail could only be given when the holder and the party to be charged at the time notice must be given, *resided in different places*, and due diligence was then required to be made and shown; and where their place of residence was the same, personal service, or a service by leaving at the dwelling or place of business, was required. The law was the same before that statute, and in all cases before and since that statute, when a personal service was not made, diligent inquiry as to the actual residence of the party was exacted. (*Sheldon v. Benham*, 4 Hill, 129. *Van Vechten v. Pruyn*, 13 N. Y. Rep. 550. *Lawrence v. Miller*, 16 id. 235. *Farmers' Bank v. Vail*, 21 id. 486. *West River Bank v. Taylor*, 34 id. 129.) The statute of 1857 is simply this in substance: that if, from the best information obtained by diligent inquiry, (in the absence of the indication mentioned,) the party sought to be charged, at the time the notice must be given, resided in the same city or town where the note was payable or was legally presented, &c., in such case the notice may be deposited in the post-office at such city or town, directed to the party at that place. The law of 1857 exacted diligent inquiry on the part of the holder to ascertain the reputed residence of the indorser, and if it was found to be in the same place where the note was payable, &c., no matter where the holder resided, it was sufficient to mail notice directed at such place. (*Randall v. Smith*, 34 Barb. 452.) From the cases above referred to and these statutes, we deduce, 1st. That prior to the statute of 1835, notice by mail could only be given when the holder and indorser did not live in the

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same city, village or town. 2d. That that statute modified the former law so that in all those cases where, as the law then was, such notice could be given by mail, it could be given by mailing it to the person, directed to the city or town where he resided at the time of indorsing, unless he should specify the post-office to which the notice should be addressed. In other words, it provided for this class of cases—where the holder and the indorser resided in different places at the maturity of the paper, that the notice could be mailed (unless he had specified the post-office) to the indorser at the place where he in fact resided at the time of his indorsing the same, although he, the indorser, might then be residing at another place. But when they both resided in the same city or town, at its maturity, notice by mail could not be given. 3d. That the statute of 1857 again modified the then existing statutory and common law, so that the notice could be mailed to the indorser at the place where the paper was payable, (although living in fact in the same or in another city or town with the holder or not,) if, after diligent inquiry, it appeared that the place where the note was payable was the indorser's reputed residence.

II. If these views are correct, the depositing of the notice in the Rochester post-office, without any inquiry as to the defendant's residence, was of no effect. It was not a proper notice before 1835; was not authorized by the statute of 1835, nor by the laws of 1857, unless, upon diligent inquiry being made before mailing the notice, the reputed residence of the indorser was there; for peradventure, after indorsing the note, the indorser had changed his residence. The note being dated at Rochester, was no evidence that the indorser still continued to reside there. (*Lawrence v. Miller, supra*, 240, *opinion*.) The legal presumption, from the facts stated in the case, is that the holders knew, or ought to have known, that the defendant had changed his residence; at least, that they knew

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enough to put them on inquiry. The notary was a bank officer; knew Perrin as a member of a firm; knew of its dissolution; of his change of business, and missed seeing him as often as before about the city. (*Lawrence v. Miller*, 238, *opinion*.)

III. This deposit in the Rochester post-office cannot be made to enure to the holder's benefit, even if the notice was forwarded to Bergen in time, if the mailing at Rochester was of no effect. 1. Because, when Perrin instructed Price to forward his letters to Bergen, he cannot be said to have waived or to have intended to waive so strictly a personal right as waiver of due notice to charge him as an indorser. 2. The deposit in the Rochester post-office being of no effect, what was done afterwards by the post in carrying the notice to any point other than where it was directed, would not affect Perrin in his rights, so as to deprive him of strict notice. 3. It would then be the notice of a stranger to him, and a stranger cannot give the notice. (*Lawrence v. Miller*, 277, and cases cited. *Carrol v. Upton*, 3 Comst. 272. Also as to necessity of inquiry.) 4. The statute requires that the postage be prepaid, and if forwarded it would be subject to a payment of three cents, to be paid at the end of the route. To be paid by whom? Perrin would not be compelled to take it out at Bergen and pay the postage.

IV. The only evidence in the case relating to the probable transmission of the notice from Rochester to Bergen, and the probable receipt of the same by the defendant, is found in the testimony of Price and the defendant. There was no conflict in the testimony; there was no legal presumption that the notary's notice ever came to the defendant's hands through the mail. If the deposit in the Rochester office was sufficient, then the defendant took the risk of ever hearing by that source about the note's dishonor; and if not sufficient, there was no presumption that it came to Perrin's hands. It is said to be too loose and

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unsatisfactory, in 9 *Barb.* 169; and such facts were insufficient, in *Flack v. Green*, (3 *Gill & John.* 474.) The legal effect of the defendant's testimony was certainly against the fact of its receipt by him. And he stood unimpeached. He testified that the first information he had was in June or July, 1866. The defendant was entitled to strict notice, and the legal effect of the defendant's testimony met and overcame whatever presumption of fact might be based on the testimony of Price. The jury could do nothing but infer that the defendant had received the notice, for there was no evidence of the fact that he did. The remarks at pages 382, 3, of the opinion in *Smedes v. Utica Bank*, (20 *John.* 372,) apply with great force in support of this criticism.

V. There was no conflict in the evidence, in the case, as to the receipt of the notice, and no dispute about the facts testified to. Therefore, the conclusion from them to be drawn was one of law and not of fact, and should have been passed upon by the court. (*Pratt v. Foote*, 9 *N. Y. Rep.* 463. 3 *Hill*, 520. 23 *Wend.* 620.) The defendant was entitled to strict notice as a condition precedent. He may have received notice, but if he did not receive it in the way and from the party authorized by law, then the notice is not binding. So that if the deposit in the Rochester post-office was not the way such notice could be given, then, although it may have been communicated to him, it was not a binding notice. "The liability of the indorser does not depend upon his actual receipt of the notice, but on the use of diligence by the holder." The indorser takes the risk. (*Dickens v. Beal*, 10 *Peters*, 572.)

VI. The authorities upon the matter of diligence and strict notice are abundant, showing that no recovery can be had when either is wanting. (24 *Wend.* 358. 3 *Hill*, 520. 3 *Comst.* 272. *Id.* 442.) And the testimony of the various witnesses exhibits how easily the holders could have ascertained the defendant's residence.

VII. The exceptions at folios 73, 74, 76 and 80 are of.

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the same character. The testimony admitted was incompetent. The occasion was over a month after the note in suit matured, and they were statements made in the absence of Perrin.

VIII. For all these reasons, the motion and request to dismiss the complaint, or to direct a verdict for the defendant, should have been granted.

IX. The exception at folio 124 was well taken. The charge in that respect was erroneous, and could not but mislead the jury. It was, in effect, that the holder need not know nor make inquiry as to the reputed residence of the indorser, and that the notice might be mailed, where both holder and indorser resided in the same place. And the succeeding exceptions at folios 125 $\frac{1}{2}$, 127 and 128 are good for the same reasons and under the cases above cited.

X. The exception at folio 126 embraces the proposition in the charge at folios 94 to 99. We can but repeat, to sustain this exception, the views in the preceding points.

1. That there is no presumption of fact or law that a letter mailed to a party is received by him. The known uncertainty of the mail forbids it. 2. This would mislead the jury, for Perrin testified that he received notice in June or July. 3. The charge covered too broad a ground in its very spirit; it assumed that an indorser could be charged "if he received actual notice," no matter in what way or by whom. 4. The charge covered a case like the following: A notary drops the notice on the street; afterwards a stranger picks it up, and seeing it directed to A., finds and hands it to him—that this would bind A.

By the Court, E. DARWIN SMITH, J. When the promissory note upon which this action was brought was made, the maker and indorser both resided in Rochester, and the note was dated at that place and discounted at the plaintiffs' bank, which was also kept in Rochester, where the plaintiffs also resided.

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The plaintiffs had the right, when the note matured, to assume that the defendant still resided in Rochester, and to act accordingly in taking the requisite steps to charge him as indorser; unless they knew that in the meantime he had changed his residence. The information on this point possessed by the notary who protested the note, must be deemed information possessed also by the holder of the paper, at the time of its maturity.

The notary demanded the payment of the note properly, and gave the proper notice to charge the defendant as indorser, addressed to him at Rochester, and deposited it in the post-office at Rochester, so addressed, with the postage prepaid. The indorser was therefore clearly charged and duly fixed as indorser, unless the plaintiff or notary knew that the defendant did not then reside in Rochester, but had, during the time the note was running to maturity, removed to Bergen. This fact was chiefly controverted at the trial, and the question was fairly submitted to the jury, who have found for the plaintiff, expressly on this issue, which, it seems to me, is entirely conclusive. The charge of the judge upon this point was entirely correct, and the finding of the jury fully warranted by the evidence. It was also submitted to the jury, whether the notice addressed to the defendant, apprising him of the non-payment of the note by the maker, was duly sent from the Rochester post-office to him, and received by him at Bergen, his place of residence, and the jury have found against the defendant on this issue.

I do not see why the verdict is not entirely right; and I can see no error in the charge, or in any direction or decision of the circuit judge during the progress of the trial. The motion for a new trial should therefore be denied, and judgment ordered upon the verdict.

New trial denied.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

PARSHALL vs. SHIRTS

The return of a deed to the grantor, and the destruction thereof, after it has been executed and delivered, will not reinvest the grantor with the title.

And if, before any conveyance of the premises is made, by the grantee, a judgment is recovered against him, the same will become a valid lien thereon, and a purchaser, at a sale on the execution issued upon such judgment, will acquire a valid title to the premises, as against the judgment debtor.

If the grantee, after selling his interest in the premises to a third person, becomes a tenant of the latter from year to year, his right of possession becomes subject to the lien of the judgment, and may be recovered by the purchaser of the premises at the sheriff's sale.

APPPEAL by the plaintiff from a judgment entered upon the report of a referee.

The action was referred to a referee, who found the following facts:

1. That in the spring of 1856, Levi Van Inwagen was the owner and in possession of the land described in the complaint. 2. That in the last days of March, or the forepart of April, 1856, the said Levi Van Inwagen, in consideration of \$1125, expressed in the deed, conveyed, by a deed duly executed, acknowledged and delivered to the defendant, Stephen Shirts, one acre, upon which was the house, lying in the northwest corner of the land described in the complaint. 3. That afterwards the said Levi Van Inwagen sold to the said Shirts the balance of the lands described in the complaint, being one acre and thirty-five hundredths of an acre, for which he received Shirts' notes; but he did not convey this last piece of land to Shirts. 4. That a short time before the 25th day of August, 1856, the defendant sold to Leonard L. Whitbeck, for a valuable consideration, all the land described in the complaint, which he had bought of Van Inwagen, and on the 25th day of August, 1856, procured Van Inwagen to convey the said land by deed to Whitbeck, which deed was dated back to the 13th day of April, 1856, and was duly acknowledged and recorded in

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Wayne county clerk's office, on the 26th day of August, 1856. Said deed was delivered by Van Inwagen to Shirts, and by him to Whitbeck, who was not present when it was executed and delivered to Shirts. 5. That at the time the deed was made to Whitbeck, the first deed given to Shirts for one acre was delivered up to Van Inwagen by Shirts, and destroyed before he executed the deed to Whitbeck. The said deed to Shirts had never been recorded. Whitbeck did not know, at the time he received the conveyance from Van Inwagen, of the existence of the previous deed given to Shirts, but supposed the title to said land to be in Van Inwagen, and that Shirts had a contract for the same. 6. That in the forepart of November, 1856, Shirts went into possession of said premises under Whitbeck and as his tenant, and has occupied the premises since, from year to year. 7. That on the 27th day of October, 1856, Samuel P. Breck and others recovered a judgment in the Supreme Court of this State, against John Shultz, and Stephen Shirts, the above named defendant, for \$466.49, which judgment was duly docketed in Wayne county clerk's office. That on the 26th day of May, 1860, upon an execution duly issued on the said judgment, the sheriff of Wayne county duly sold the said two and thirty-five hundredths acres to the plaintiff, for the sum of \$500; and on the 12th day of September, 1861, duly made, executed and delivered to the plaintiff a sheriff's deed of the said premises, conveying to him all the interest which the said Shirts had therein on the day of the docketing the said judgment, which deed, on the same day, was recorded in Wayne county clerk's office. 8. That on the 9th day of December, 1861, and before the commencement of this action, the plaintiff duly demanded the possession of said premises, under the sheriff's deed, of the defendant, who was then in possession as aforesaid, which was refused; whereupon this action was brought.

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The referee found, as conclusions of law, that at the commencement of this action the said Leonard L. Whitbeck had lawful title, and was the owner in fee simple of the said premises described in the complaint; that the defendant was lawfully in possession as his tenant, and that the plaintiff was not entitled to recover in this action. He therefore ordered judgment in favor of the defendant, against the plaintiff, for costs and disbursements.

W. F. Cogswell, for the appellant. I. By the deed from Van Inwagen to the defendant, the title to the premises became vested in the latter. Such title cannot be divested by the destruction or surrender of the grant. This is so both at law and in equity. (*Raynor v. Wilson*, 6 Hill, 469. *Nicholson v. Halsey*, 1 John. Ch. 417. *Schutt v. Large*, 6 Barb. 373.)

II. The connection of Whitbeck with the title will not aid the defendant, for two reasons: 1st. The defendant cannot prevent the plaintiff's recovery by showing that Whitbeck has a title which he might set up against the plaintiff. The case shows the defendant to be the owner in fee of the land, which has been sold to the plaintiff by virtue of a valid judgment against him. That title he cannot defeat by showing that some one else might allege and maintain that he, the defendant, was estopped from setting up his title. The plaintiff is entitled to recover the possession, and litigate Whitbeck's title with him. 2d. Whitbeck is not a bona fide purchaser from Van Inwagen as the owner of the land. He is not a purchaser from him at all. His purchase was from Shirts, and he is presumed in law to have taken the deed from Van Inwagen with notice of all the facts. It is a very curious and artificial way in which the defendant seeks to defeat and has, thus far, defeated the plaintiff's right. It is this: the defendant would be estopped from setting up his title against Whitbeck. The plaintiff claims under the defendant; there-

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fore he would be estopped as between him and Whitbeck. The defendant is Whitbeck's tenant; therefore he may set up the estoppel against himself, to protect himself. This would be a novel application of the doctrine of estoppel *in pais*.

III. It was manifest error to dismiss the complaint, whatever may be thought of the foregoing questions, for the reason that the defendant, Shirts, had an interest in the land in question, which was subject to the lien of the judgment upon which the plaintiff purchased, and liable to sale on execution. His estate was an estate for years. (1 *R. S.* 722, § 5. 3 *Kent*, 342, *marg. paging*. 2 *R. S.* 359, § 3.)

IV. Whitbeck was allowed to testify, under objection, that he purchased the property in good faith. This was clearly erroneous. It was prejudging the question that was to be passed upon by the referee.

C. Mason, for the respondent. I. The evidence showing a present subsisting title out of the plaintiff, the defendant not having entered under him, and all matters pertaining to, and connected with, the obtaining such title adverse to the plaintiff, was admissible evidence, and the referee was right in permitting Whitbeck's deed to be read in evidence, and in allowing the witness to answer the questions, as to whom he contracted with; whether or not he had knowledge of any prior title; if he acted in good faith; what consideration he paid; and when he paid for the premises. (*Bloom v. Burdick*, 1 *Hill*, 130. *Jackson v. Hudson*, 3 *John*. 375. *Colvin v. Baker*, 2 *Barb.* 206. *Raynor v. Wilson*, 6 *Hill*, 469.)

II. The proof shows the premises unoccupied when Whitbeck took his deed from Van Inwagen, and the record showed the title in Van Inwagen. No evidence was given on the trial showing that Whitbeck had notice of any prior deed to Shirts, and Whitbeck himself swears

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positively he did not learn the fact till two or three months after he had taken his deed and paid for the premises. The referee was fully warranted in finding that "Leonard L. Whitbeck did not, at the time he received the conveyance from Van Inwagen, know of the existence of the prior deed from Van Inwagen to defendant." Explicit evidence of notice of a prior unregistered deed must be given, in order to destroy the effect of a subsequent registered deed. (12 *John*. 452.)

III. The proof shows that the arrangement to destroy the deed from Van Inwagen to Shirts, and have Van Inwagen convey the premises in question to Whitbeck, was made without the knowledge or consent of Whitbeck, to whom Shirts represented the title to be in Van Inwagen, and the public record confirmed Shirts' statement. A universal principal in law, which will not allow one to take advantage of his own wrong to the injury of another, will estop Shirts from using his legal title to impeach Whitbeck's equitable title. And Parshall, the plaintiff, who derives his pretended title through a sale under a judgment against Shirts, stands in no better position to impeach the title of Whitbeck than Shirts. In equity the purchaser under a judgment takes the land subject to all equitable claims, prior in point of time to the judgment, of which he had notice at or prior to the sheriff's sale. (3 *Paige*, 117. 1 *Barb*. 610.) It is a general principle of law, that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess. (10 *Paige*, 219. 1 *id.* 473.) The rule of equity under our recording acts is also the rule of law. (6 *Wend.* 213.)

IV. The proof shows conclusively, and so the referee finds, that Whitbeck was a bona fide purchaser of the premises in question for a valuable consideration, without notice or knowledge of a prior conveyance of the whole or any portion of said premises to Shirts; and is protected in his title under the statute by the recording

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acts. The deed of a bona fide purchaser for a valuable consideration first recorded, is protected against prior unrecorded conveyances. (13 *N. Y. Rep.* 514. 1 *Barb.* 610.) A bona fide purchaser of land for a valuable consideration, whose deed is first recorded, is protected against a prior unrecorded conveyance, although his grantor purchased with notice thereof. (*Wood v. Chapin*, 3 *Kern.* 509. *Hooker v. Pierce*, 2 *Hill*, 650. 18 *John.* 295.)

By the Court, E. DARWIN SMITH, J. The conveyance from Van Inwagen to the defendant Shirts, made in March or April, 1856, clearly vested in him the title to the one acre of land therein described. And the subsequent return of said deed to the grantor, and the destruction thereof, did not reinvest Van Inwagen with the title. (*Nicholson v. Halsey*, 1 *John. Ch.* 417. *Jackson v. Anderson*, 4 *Wend.* 474. *Kellogg v. Rand*, 11 *Paige*, 59. *Raynor v. Wilson*, 6 *Hill*, 469.)

The title to this one acre was therefore in the defendant at the time when the judgment of Breck and others was recovered against him, and such judgment became a valid lien thereupon. Hence the plaintiff, as against the defendant Shirts, made out on the trial a perfect title to this one acre of land. Whether he made out such title as against Whitbeck is a different question. Whitbeck clearly took no title to this one acre of land, because the title to it was not in his grantor at the time of the conveyance to him, but was in fact and in law in the defendant Shirts. If Whitbeck had purchased this acre of Van Inwagen without notice of the deed to Shirts—such deed not being recorded—he would clearly have been a purchaser in good faith of this acre, and would be protected by the registry act against the unrecorded deed to Shirts. But if the registry act only protects successive purchasers from the same grantor, as held in *Raynor v. Wilson*, (6 *Hill*, 469,) the plaintiff's title would still prevail, and

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the plaintiff would be entitled to recover this acre upon the title proved on the trial. But this is a question between the plaintiff and Whitbeck, which should perhaps be left for decision as between them, as Whitbeck is not a party or privy to this action, and would not be bound by any decision in this suit upon that question. The plaintiff was clearly entitled to recover the premises from the defendant Shirts, who was in possession and who alone defends. Shirts could not set up this title of Whitbeck. He was a tenant of Whitbeck from year to year, at the time of the commencement of this suit, and his term had some time to run. This right of possession the plaintiff was clearly entitled to recover. It was error therefore to dismiss the complaint, and the judgment must be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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THE PEOPLE, *ex rel.* The Society for the Reformation of
Juvenile Delinquents in the City of New York, *vs.*
FRANCIS DEGNEN.

A commitment of a juvenile offender to the House of Refuge, in the city of New York, need not specify the period of imprisonment. The law fixes that, by directing that persons committed to the House of Refuge shall be detained in its custody as follows: males until their majority, and females until the age of eighteen years.

Hence a commitment sending to the House of Refuge, "to be dealt with according to law," a person under sixteen years of age, who has been convicted of a misdemeanor, is right and proper.

CERTIORARI to review an order made by Justice
Barbour, of the Superior Court of the city of New

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York, discharging the respondent, Francis Degnen, from the custody of the managers of the House of Refuge on Randall's Island. The order was made on the return to a writ of *habeas corpus* previously issued by the said justice, and directed to the superintendent of the House of Refuge, to inquire into the cause of the respondent's detention. The return to the writ, the truth of which was admitted on the hearing, set forth that the respondent was detained by virtue of a warrant of commitment, which was made a part of the return, and from which it appeared that the respondent, on the 13th day of October, 1868, after having been duly convicted of the misdemeanor of petit larceny, by the court of special sessions of the peace for the city and county of New York, had been sent to the House of Refuge.

The judgment of the court, as set out in the commitment, was as follows: "That the said Francis, for the misdemeanor aforesaid, whereof he is convicted, (it appearing to the court that he is under the age of sixteen years,) be sent to the House of Refuge, there to be dealt with according to law."

Mr. Justice Barbour held, that inasmuch as the Revised Statutes prescribe, as the limit to the punishment of petit larceny, an imprisonment of six months, an imprisonment in the House of Refuge, "there to be dealt with according to law," as appeared by the commitment, was indefinite in regard to the term of imprisonment, and therefore illegal. For these reasons, the said justice, by an order reciting them, and dated November 21st, 1868, discharged the respondent from custody.

Henry A. Cram, for the relators. Since the incorporation of the House of Refuge, in 1824, it has always claimed that the children sent to it by the courts were subject to be detained during their minority; this claim has been invariably acted on, and seldom disputed.

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The proposition of Judge Barbour, if legal and enforced, would not only defeat the very object of the institution—the reformation of the children—but would at once empty the institution, as all the commitments to it would be void; it would, in truth, destroy the charity.

I. That the jurisdiction of the House of Refuge extends over the period of minority, and that the commitment should mention no definite term, but is sufficient when it provides that the minor shall be sent to the House of Refuge, “there to be dealt with according to law,” is clearly apparent from the nature of this great charity, the object of its institution as declared in its charter, and the positive provisions of the charter. The House of Refuge is not a prison, but a reformatory institution; its charter declares its object to be “the reformation of juvenile delinquents.” The delinquent escapes from the penalty of the law, avoids the penalty attaching to his crime, and is sent to a charitable institution to be reformed. This end could never be reached by a sentence of six months detention in the House of Refuge.

The following provisions of the law clearly give the power claimed, and hitherto exercised by the House of Refuge: See *Laws of 1824, chap. 126, § 4*, of “An act to incorporate the Society for the Reformation of Juvenile Delinquents in the City of New York,” passed March 29, 1824. “4th. And be it further enacted, that the said managers shall have power, in their discretion, to receive and take into the House of Refuge, to be established by them, all such children as shall be taken up or committed as vagrants, or convicted of criminal offenses in the said city, as may in the judgment of the court of general sessions of the peace, or of the court of oyer and terminer, in and for the said city, or of the jury before whom any such offender shall be tried, or of the police magistrate, or of the commissioners of the Alms House and Bridewell of the said city, be proper objects; and the said managers

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shall have power to place the said children committed to their care, during the minority of such children, at such employments, and to cause them to be instructed in such branches of useful knowledge as shall be suitable to their years and capacities; and they shall have power, in their discretion, to bind out the said children, with their consent, as apprentices or servants, during their minority, to such persons and at such places, to learn such proper trades and employments, as in their judgment will be most for their reformation and amendment, and the future benefit and advantage of such children; provided that the charge and power of the said managers upon and over the said children shall not extend, in the case of females, beyond the age of eighteen years." See also the act of April 10, 1860, (*Laws of 1860, ch. 241*), "An act to amend an act entitled an act to incorporate the Society for the Reformation of Juvenile Delinquents in the City of New York," passed March 9, 1824.

§ 1. The act entitled "An act to incorporate the Society for the Reformation of Juvenile Delinquents in the City of New York," passed March 29, 1824, is hereby amended by adding to the fourth section thereof the following words: The managers of the said society shall receive into the House of Refuge established by them in the city of New York, whenever they may have room for that purpose, all such children as shall be taken up or committed as vagrants, in any city or county in this state; and might now, if convicted of criminal offenses, in such city or county, be sent as directed by law, to said House of Refuge, if, in the judgment of the court or magistrate by whom they shall be convicted as vagrants, the aforesaid children shall be deemed proper persons to be sent to said institution. The powers and duties of the said managers, in relation to the children whom they shall receive, in virtue of this act, shall be the same in all things as now

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provided by law in case of children convicted of criminal offenses and committed to the charge of said managers."

The power claimed for the House of Refuge has been recognized by the following decision of the Supreme Court, in the case of *Marks Croffskie*, rendered December 10, 1866: LEONARD, J. "The term affixed by the magistrate is without authority, and void, when the delinquent is sent to the House of Refuge. The term is void, but it is simply surplusage. When a juvenile delinquent is sent to that institution, he is within the jurisdiction of, and subject to be dealt with by, the managers, according to their *discretion*, until he is bound out as an apprentice, discharged, or comes of age. I find nothing entitling the boy to a discharge as a legal right. His friends must apply to the discretion of the managers." In the case of the *People, ex rel. Margaret Cornell, v. The House of Refuge*, which was heard and decided by Recorder Hoffman, the following opinion was delivered: "The House of Refuge is a reformatory institution, not a prison. When the legislature authorized courts to send young persons convicted of crimes to this place, it was with a view to their care and custody during minority, and not with a view of confining them a certain period by way of punishment. An order of the court, therefore, sending to the House of Refuge a young person, 'to be dealt with according to law,' is right and proper."

CLERKE, P. J. It is a mistake to say that the term indicated in the conviction is indefinite, so that it gives authority to the House of Refuge to confine the prisoner for an unascertainable period. The words of the conviction itself, indeed, do not specify the precise period. But it refers with sufficient certainty to the authority given by law to this institution; and that is, in express terms, to retain in its custody male persons until their majority, and female persons until the age of eighteen years. By

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this provision the construction of every conviction is governed. Even if there was any ambiguity in the language, it should be construed liberally; for, the authority given to this institution is beneficent in its effect on the individual prisoner and on society; and, in relation to the former, the exercise of the authority amounts to a commutation of the ordinary punishment. Strictly speaking, confinement in the House of Refuge does not partake of the degradation or physical suffering to which persons are subject, usually, in prisons. Its discipline is reformatory, with the view of saving persons, during the susceptibility of tender years, from total profligacy, and restoring them to society in a condition no longer dangerous to it.

The order of the judge should be reversed.

GEO. G. BARNARD, J. The Society for the Reformation of Juvenile Delinquents was incorporated by the legislature in 1824. Power was given to the managers of the society "to receive and take into the House of Refuge to be established by them," certain classes of delinquent children, and "to place the said children committed to their care, *during the minority of such children*, at such useful employments, and to cause them to be instructed in such branches of useful knowledge, as shall be suitable to their years and capacities." An annual report was to be made, by the managers, to the legislature, and to the corporation of the city of New York, of all the facts and particulars which tended to show the effect, whether advantageous or otherwise, of the association. The legislature also directed that the act should "be construed, in all courts and places, benignly and favorably for every humane and laudable purpose therein contained." The institution thus created was a charity, and not a prison. Its object was the reformation of children, and not their punishment. The children received by them for this purpose were received during their minority for boys, and not

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beyond the age of eighteen years for girls. In furtherance of this charitable design of reformation, courts by which juvenile offenders were convicted of crime were empowered, instead of sentencing such person to a state prison or county jail, to order "that he be removed to, and confined in, the House of Refuge established for the reformation of juvenile delinquents in the city of New York." The sentence of the law upon the criminal is not imposed. Instead thereof he is committed to the care and custody of this charitable institution during minority, to be instructed in useful knowledge. No court can increase the term of detention, or shorten it. The act incorporating the society fixes it, once for all. The learned judge fell into an error in discharging the defendant. The order should be reversed, and the defendant remanded to the care and custody of the relators.

SUTHERLAND, J., concurred in the conclusion.

Order reversed.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clarks, Sutherland and Geo. G. Barnard, Justices.*]

COURTLANDT KELSEY *vs.* THE NORTHERN LIGHT OIL
COMPANY.

In an action against a corporation, by a stockholder, to have his contract of subscription rescinded and the amount he had paid refunded to him, on the ground that the company did not acquire or own certain pieces of property which it was represented it would acquire, the judge charged the jury that if, upon the prospectus, "the plaintiff had the right to believe that it was reasonably certain that the company would acquire such property, and that the company was organized with a view to ownership of those pieces of property, then, if they did not obtain it, he would be entitled to recover."

Held that the charge was erroneous.

A corporation being about to be formed, for the purpose of dealing in and developing oil, in oil lands, certain named property was expected to consti-

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tute its invested capital. After it should become organized it was to purchase the several pieces of oil property mentioned in the prospectus. It succeeded in obtaining all, except one piece, as to which there was some defect of title. *Held*, that in the absence of any misrepresentation or fraud, a stockholder could not, on the ground of the failure of the company to acquire all the land mentioned in the prospectus, maintain an action against it to recover back the amount paid by him upon his subscription. MULLIN, J., dissented.

Such an action cannot be sustained unless the objects and purposes of the company have so entirely failed that the corporation may be said to be virtually dissolved. *Per* PECKHAM, J.

Where there is, at most, a failure only as to about three fourths of one tenth of the property intended to be owned by the company, and the money to buy that is in the company's treasury, this is not a sufficient ground for dissolving the corporation. *Per* PECKHAM, J.

THE plaintiff alleges in substance, in his complaint, that he became a subscriber to the capital stock of the Northern Light Oil Company of New York, upon the strength of certain representations alleged to have been made by the company that they owned certain property, and also upon the strength of a further representation, alleged to have been made by the company, that all subscribers, not finding the property as represented, could withdraw from the company. He then alleges that the company did not own certain pieces of property which were thus represented to be owned by them; that the stock of the company had become much depreciated in value, and that he had tendered back his stock and demanded the amount of his subscription to be repaid to him by the company, which they had refused to do.

The defendants, in their answer, denied the making of any of the alleged representations, and in the main denied all the material allegations of the complaint; admitting, however, that they never did own two certain pieces of property which the complaint had alleged the company had represented it owned, and stating, by way of explanation, that they failed to acquire this property in consequence of a defect in the title.

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On the trial, the plaintiff proved that one Lockwood solicited him to subscribe for or take 100 shares of the stock, and at the time exhibited to him what purported to be a *prospectus*, and also an advertisement respecting the company, cut from the columns of some newspaper, and that he thereupon signed a paper agreeing to take 100 shares of the stock. It appeared that Lockwood acted as an agent or broker under the direction of one Avis, of the firm of Avis, Plumer & Co., of New York. The plaintiff attempted to prove that Avis was authorized by the company to exhibit the prospectus and procure subscriptions, but the evidence upon this point went no further than to tend to show that certain of the trustees had given such authority to Avis. No evidence whatever was offered that the company, by any corporate action, ever authorized any one to exhibit any prospectus, make any representation, or procure any subscriptions to the stock. The plaintiff's evidence, however, was received against the defendants' objection, as evidence of authority conferred upon Avis by the company.

The plaintiff also proved that Sylvanus J. Macy, one of the trustees and the treasurer of the company, received the money paid by the plaintiff for his stock, and sent him the certificate; and it was claimed that Macy so received the money on behalf of the company, and that the company thus took to itself the benefit of the contract or subscription made by the plaintiff, and thereby became bound by the representations upon which it was made, as much as if they had originally authorized them to be made.

The defendants introduced contradictory evidence as to any representations having been at any time directly authorized by the company. They further proved that, prior to the time of the formation of the company, all of its capital stock was, by an agreement among the projectors, disposed of, and that, immediately upon the

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formation of the company, a resolution was passed, recognizing this prior agreement, and directing that all the capital stock, with the exception of a thousand shares, should be issued to Mr. Macy, as a special trustee for those who had thus agreed to take the stock, and that the thousand shares excepted as above mentioned, were at the same time taken by the gentlemen becoming the trustees, and paid for, and the certificates issued to them, so that, at the time of the plaintiff's subscription, the company did not own or have the control of a single share of its stock.

The defendants further offered evidence, showing that Mr. Avis was one of the projectors, and by the agreement before mentioned was to take 5000 shares of the stock, and that the stock which the plaintiff received was not issued to him by the company, but was transferred to him by Mr. Macy as a portion of the 5000 shares which he had agreed to take, and that that was all done by Mr. Macy, without any direction from the company, who had nothing to do with the stock but by the authority and direction of Mr. Avis.

It appeared, upon examination of the 'prospectus, that it did not purport to be issued by the company, or by its authority, but by the projectors of the company, of whom the only ones named in it were George A. Boyce, and Avis, Plumer & Co.

The principal points of contest at the trial were, as to whether the alleged representations were of an existing state of facts, or of what was in contemplation merely, and as to whether the defendants or Avis, Plumer & Co. were the real principals of Lockwood, who procured from the plaintiff his subscription. The learned judge left the first question to the jury. As to the second, he held, upon the evidence, that the company were the *real principals*, and so instructed the jury, in effect.

Exceptions were taken to some of the rulings of the

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learned judge upon the admission and exclusion of evidence, the denial of the defendants' motion to dismiss the complaint, and to portions of his charge to the jury.

The case came before the general term, upon the defendants' appeal both from the judgment and the order of the special term denying a motion for a new trial.

PECKHAM, J. In my opinion the judgment should be reversed. Apart from any other question, there was one proposition submitted to the jury, by the learned judge, which I think cannot be maintained, and upon which the verdict may well have been based. He charged that "If upon this paper (the prospectus) the plaintiff had the right to believe that it was reasonably certain that the company would acquire this property, and that the company was organized with a view to ownership of these pieces of property, then, if they did not obtain it, he would be entitled to recover." Upon this charge the jury must necessarily have found for the plaintiff.

It will be marked, here, that no misrepresentation or fraud is the basis of this verdict; none is within this charge. Here was a corporation about to be formed, with a capital of one million. Certain named property was expected to constitute its invested capital. Its business was to deal in and develop oil in oil lands. After its organization, it was to purchase the several pieces of oil property mentioned in the prospectus. It succeeds in obtaining all, except one piece, called the "Hammond well," or the piece upon which said well was sunk. As to this piece there was some defect of title, and the consideration money therefor, \$75,000, was paid to or left in the treasury of the company.

The good faith of the company, or of its agent, is not questioned.

Thus, if this action can be maintained, every other subscriber to the stock, or every stockholder, may sue the

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plaintiff's evidence, or the jury were bound to find the fact to be as proved on the part of the plaintiff. The defendant gave its evidence, and the jury found against it; and for the purposes of this appeal it must be taken to be the fact that the defendant was the vendor of the stock, pursuant to a contract made with the plaintiff.

But if I am wrong in this, a brief examination of the evidence on the part of the defendant will show that so far from overcoming, it strengthens the case made by the plaintiff.

One of the grounds relied on to prove that the contract for the stock could not be with the company, is that certificates for the entire capital stock had been issued to subscribers before the plaintiff subscribed, and there was not, therefore, any stock owned by the company, which it could sell or deliver to the plaintiff.

It was proved, on the trial, that on the same day the company was organized, (which seems to have been the 24th October, 1864,) nine of the trustees subscribed for \$10,000 of the stock, and a resolution was passed that the remaining \$990,000 of the capital, together with \$10,000 in cash, be delivered to one Macy, the trustee for the purchase of the oil lands proposed to be acquired by the company, "*when he shall deliver to this company the title and possession of said property.*" In pursuance of this resolution, the officers did issue to Macy a certificate for 99,000 shares, and certificates for 100 shares to the other subscribers. The date of the certificate to Macy is the 4th of November.

The plaintiff's subscription for the 100 shares and the payment of \$300 upon it were, as Lockwood testifies, concurrent acts. That money was received by Macy on the 11th of November, and for it he gave a receipt as trustee. The date of the plaintiff's subscription must have been after the 3d of November, because Lockwood testifies that Avis gave him, when he came to Bridgeport to see him,

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papers dated the 3d of November. I think we may assume that the plaintiff's subscription was between the 3d and 11th of November.

If the subscription was on or after the 4th of November, Macy held, when it was made, the whole capital stock of the company, except the 1000 shares issued to others, as above stated. If, however, he had not received a conveyance of the property, the stock was still the property of the company; it had no validity until it was delivered in payment of the land. When he received or delivered to the defendant a conveyance of the oil lands, there is no proof in the case. When he did receive such conveyance, the stock became the property of the owners of the land, as Steele testifies that the owners of the land were to have voted to them the whole stock of the company to pay for the property.

It is not proved that, when the plaintiff subscribed, the company did not own the 99,000 shares of its stock. But let us suppose it had transferred to Macy all of said stock. We look in vain for any evidence that there was any notice given to the plaintiff that he was purchasing stock of Avis, Plumer & Co., or other stockholders of the company. The arrangements between the owners of the land and the trustees of the company—the resolutions of the 25th of October—were known to the trustees only, and were not known to the plaintiff. If he was purchasing stock of a stockholder, it was a fact unknown to him. He was asked to *subscribe* for stock, and he did. The only subscription for stock that can be made is for the stock of the company, and when made, it is a contract between the company and the subscriber. No person holding stock in a corporation and desiring to sell it, would ask another to subscribe for it. That language is, I repeat, only used when it is proposed to another to enter into a contract with an existing corporation for a portion of its capital stock.

It is said that this agreement, signed by the plaintiff,

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was not in form an agreement with the company, but is an agreement between the several subscribers to take stock, upon terms indicated in the paper itself. I do not find that the paper actually signed by the plaintiff is inserted in the case, and I assume that the counsel understands that the plaintiff signed the same paper to which is affixed the names of Aspinwall and others, whereby they agree to take, in the aggregate, \$582,500 of the stock. That paper recites that certain persons named proposed to organize a company with a capital of \$1,000,000 to purchase certain coal lands, and to issue in payment therefor 100,000 shares of the capital stock of said company. They agree to subscribe the sums set opposite their names, towards purchasing the annexed schedule of property, to be paid to trustees to be elected by the subscribers *after the whole amount of stock shall have been taken*, as follows: 30 per cent when the whole amount of stock is taken; 20 per cent thirty days thereafter; 20 per cent in sixty and 30 per cent in ninety days. By this paper the stock of the company, when organized, was to be issued to pay for the land, and what obligation was assumed by those subscribing it, it is difficult to comprehend, unless it is to be deemed an agreement to take stock in the company when organized. If this is the meaning of it, then it ceased to be an agreement to take stock in such a company when it was actually incorporated; and it is certain that the plaintiff did not sign until after incorporation.

Had the stock not been actually issued to the plaintiff, no action could have been maintained against him, on this paper, if it is the one signed by him. But when he paid and received a certificate for his stock the agreement was complete, and it ceased to be of the slightest importance whether it was a valid or void agreement he had signed.

If this paper showed that the defendant was contracting for stock which had been issued to and held by other par-

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ties, it would of course preclude him from saying that he purchased of the company. But such is not the fair import of the paper.

It may be said that the intention as disclosed by this paper was to issue the stock of the company in payment of the land, and that the persons signing this agreement thereby obligated themselves to take from the persons to whom the stock was issued, stock to the amount subscribed by each. To justify this construction, it must appear that the stock was actually and in good faith transferred by the company to the persons selling the land. The paper manifests no such intention. The owners of the land never intended to take stock in payment of their property. The very terms of the agreement are, that each subscriber becomes such for the amount or number of shares set opposite his name "*towards purchasing the annexed schedule of property at \$1,000,000.*" Each subscriber annexed to his signature an amount in dollars and cents, and not shares.

The manner in which the arrangement was carried out shows that it was never the intention that the owners of the land should take their pay in stock. The transfer was to *Macy as trustee*, and before title to the property was conveyed, he proceeded to sell the stock and give certificates, in the name of the company, to whoever was entitled.

No person reading this paper after the organization of the company, would suppose that he was buying stock of *Macy*, as trustee or otherwise; and the whole business was conducted so as to convey to subscribers the impression that they were dealing with the company. Yet it is now claimed that the company had no stock to sell, and they were dealing with men of whose existence they had no knowledge, and with whom they never intended to contract.

When the plaintiffs and others who subscribed after the incorporation of the company paid money on the stock, they received a receipt signed by *Macy, trustee*. Trustee

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of what? He was a trustee of the company, and publicly known as such. He was the *special* trustee appointed by a resolution of the board to receive the stock and pay it out for the land. The plaintiff knew him in the *former* character, but not in the *latter*. The designation of trustee, used in signing the receipt, was conclusive evidence to the plaintiff that his money was received by the company. And if this designation can now be used to charge the plaintiff with the knowledge that Macy was a special trustee, it would be imputing to him knowledge which, upon the proof in this case, he never had.

It is next insisted that the company never authorized Avis to issue the prospectus, and as a consequence, that it is not liable for any representations contained in it. This was a question for the jury, and they have disposed of it. But let us see whether the finding that it was authorized by the company is not supported by the evidence. Avis says he was requested by Howland, Kent, Watson and others, to assist in getting up a company; that he prepared the prospectus and submitted it to Howland, Kent, Brown, Jones and Steele, at a meeting at which all these persons were present. They approved it, and he had it published by their directions. These persons took copies to get subscribers; and he knew that Howland used them in getting subscribers. The company paid for printing it. And Lockwood testifies that he showed the prospectus, on one occasion, to Howland, the president, and asked him if its statements were correct, and he said they were. The witness could not say that he saw its contents. Avis testifies that he was employed by the company to procure subscriptions for stock, and he delivered this prospectus to Lockwood, and Lockwood exhibited it to the plaintiff as a document issued by the company, and upon the strength of it the plaintiff's subscription was obtained.

Of the persons advising the preparation and presenting

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of the prospectus to be used in procuring subscriptions to stock, who knew its contents and approved of them, Howland, Steele, Macy and Watson, were elected trustees, and they knew, therefore, the contents, and the use intended to be made of the document.

Many of these matters are denied by Howland and Macy, but the jury have believed the plaintiff's witnesses, and unless the court is, for the purposes of this case, to usurp the province of the jury, the finding on this point must stand.

In answer to all this, it is said there is no proof that the corporation ever authorized any person to receive subscriptions for stock. That Avis, Plumer & Co. were not only agents for the corporation, but were authorized to receive subscriptions for stock, is established by the letters of the secretary, of October 28th, 1864, addressed to A., P. & Co., in which he asks them to bring to the office of the company all the subscription lists that they might have to the stock of the company, and to withdraw all advertisements. Can there be a more unequivocal recognition of an agency than this? The trustees of the company knew of the issuing and use to be made of the prospectus. One of them used it to induce subscriptions of stock. Avis, Plumer & Co. were the agents of the company to procure subscriptions, and they employed Lockwood for that purpose, delivering him the prospectus. He used it to induce persons to subscribe. The money paid on such subscriptions, and the subscriptions themselves, were sent to the company, credit given for it, and stock issued.

In view of these facts, it is impossible to say that the company was not the seller of the stock.

The defendant's counsel doubts the truthfulness of the testimony of Avis, and suggests that it is unworthy of credit. But with the amount of credit to be given to his evidence, we have nothing to do. It was for the jury to

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pass upon that question, and with their decision we must be content.

If it be true that the corporation was the vendor of the stock, it follows that it is chargeable with whatever legal responsibility results from the contract; and it is responsible for the representations of its agents, by which the plaintiff was induced to enter into the contract, whether honest or fraudulent.

The representations on which the plaintiff claimed he relied, and which induced him to enter into the contract for the stock, were those relating to the Hammond well and the Smith Jones farm. And in relation to these, the jury were instructed that if they found that that well and farm were of any such value, and formed so essential a part of the whole scheme that the plaintiff would not have entered into it and become a stockholder if he had understood that the corporation could not have acquired this property, then the representation would be material. There is no exception to this part of the charge, and the jury must therefore have found that the representation was not only material, but so material as that the plaintiff would not have subscribed for stock had it not been for this representation.

Again; it was submitted to the jury to say whether the representation thus made was true; and they were told that it was conceded that the corporation did not acquire title to the pieces of land referred to. To this part of the charge there is no exception, and the jury must have found the representation to be untrue.

This brings me to the point principally relied on by the appellant's counsel to reverse this judgment; that is, the alleged error in that part of the charge to the jury, in which they were told that if the representation was that the defendant was the owner of the property, or it was understood, and it gave the plaintiff reason to understand, that this identical property was to be the property of the

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company, and to form the capital with which it was to carry on business, although it might not have owned it at the moment, and he was thereby led into the arrangement, the defendant must make it good.

Again; the jury were told that if upon this paper the plaintiff had the right to believe it was *reasonably certain* that the defendant would acquire this property, and it was acquired with a view to the ownership of the property, if it did not obtain it he would be entitled to recover. But if it was understood by the plaintiff that the defendant might or might not acquire title to these pieces of property, depending upon contingencies thereafter to occur, then it was not material, and the plaintiff could not recover.

One of the errors in this part of the charge, insisted on by the defendant's counsel, is, that it was submitted to the jury to say which of two constructions of the representations in the prospectus was the correct one—that is to say, whether the representation was that the company had acquired the title to the property, or whether it was *reasonably certain* that it would acquire it. The counsel insists that the construction was for the court, and not for the jury.

If the prospectus spoke as of a day anterior to the incorporation of the defendant, what was said in it as to a company *to be incorporated*, and *to acquire* property, would naturally refer to an incorporation and acquisition of property *thereafter* to take place. But in that prospectus is found such language as this, speaking of the Rynd Farm Oil Company, "*it is paying a royalty to this company* of one-eighth of all the oil in all the wells, free of expense to *this company*." Again it says, "the company's property now comprises certain lands and wells which are specified, producing to *this company* over 125 barrels per day, which, at \$8 per barrel, pays over 36 per cent per annum on its entire capital," &c.

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The plaintiff subscribed after the organization. When this prospectus was exhibited to him, what construction was he authorized to put upon this language? The incorporation of the company was not then a thing in the future; that was complete. When it said *this company's* property consists of such and such lands, and *it is in the receipt of so many barrels of oil* per day, was he thereby to understand that the acquisition of property was *yet to be made*, or was he not right in inferring that the company *then owned* all the property it proposed to acquire.

To a proper construction of this paper, it was necessary to ascertain the time it was exhibited to the plaintiff as if before subscribing, it must receive one construction; if after, another.

The general rule is that the construction of contracts belong to the court, and not to the jury. (2 *Cowen & Hill's Notes*, 1420. 17 *Wend.* 538. 23 *Barb.* 431.) But this is not universally true. When there is a conflict of evidence in regard to the terms of the contract, or when there are extraneous circumstances proved which affect the construction, then the construction must be given to the jury. (2 *Cowen & Hill's Notes*, 1420.)

In this case the jury must ascertain the time when it was signed by the plaintiff, and, as a consequence, whether the representation was of something to be done, or as to something which had already occurred. For these purposes, the paper would not be for the construction of the court, but of the jury.

The same considerations which Chief Justice Marshall held in *Elting v. Bank of the United States*, (11 *Wheat.* 59,) rendered proper the submission of the construction of certain papers to the jury, in that case, apply in all their force in this. If the representations are to be considered as representations of existing facts, what was said by the court as to "reasonable certainty" of the defendant's procuring the property, would be wholly immaterial. It would

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be an instruction upon a proposition outside of the law. But it is due to the defendant that the question whether that branch of the instruction is correct, should be met and decided without regard to any mere technicality, so that if it is wrong, and has caused injury to the defendant, a new trial may be had.

The first objection to this clause of the charge is that it authorized the jury to find for the plaintiff, if they should find the representation to be that the defendant would *thereafter acquire the Hammond well and the Smith Jones farm*; that the acquisition being thereafter to happen, it was contingent and uncertain—matter of conjecture and not of fact.

Aside from any authority upon the precise question thus presented, I insist that the construction is right, upon well settled principles. A company is organized to purchase and work mineral lands, and the officers and agents give out that it will acquire title to certain lands, describing them, which contain valuable ores, and which when worked will yield large dividends to the company. Upon this assurance persons take stock, and it becomes impossible to get title. In the case supposed there is not a shadow of intentional fraud or deception; yet can it be possible that the persons paying cannot sue for and recover their money? In such a case the stockholder would be entitled to recover, either on the ground of mistake or of failure of consideration. But I think also he has the right to rescind the contract, on discovering that the representation as to the mine was unfounded.

The distinction between a representation, which amounts to a positive *assurance* that something *will* occur or *be done*, in the future, whereby the value of the subject matter of a contract will be made more valuable, and one which is the expression of a mere opinion or conjecture, is obvious enough, and is acted upon by men of business every day. And when the assurance is not made good, the other party

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to the contract is defrauded. Such a representation, to be relied upon, must of course be of something to be done or acquired, which the person making it has the physical or legal capacity to perform. Such a representation is calculated and intended to have the same influence upon the mind of the other party to the contract that a representation that the act was already done, or thing acquired, would have; and the injury, if it is not done, is precisely the same.

A representation, on the other hand, as to acts which it is not physically or legally possible for the person to perform, or in regard to matters of opinion or conjecture, or such as every vendor of property is permitted to make without incurring liability in the event of their being untrue, the other party to the contract does not rely upon and is not prejudiced if they prove to have been unfounded. Assurances by vendors that they will, before delivering the property sold, cause it to be put in the condition required by the purchaser, is within the class of representations to which I refer. If in such case the purchaser, relying on the assurance that the vendor will do as he assured him he would, pays his money, and the assurance is not made good, the purchaser is relieved from his contract, as effectually as if the assurance related to the present condition of the property, and proved to be untrue. The thing to be done, may be done; the person making the representation is presumed to have informed himself whether he could perform it. In such cases the person to whom it is made is not trusting to opinion or conjecture, but to one of the ordinary contingencies of business. All contracts to be performed in the future involve these contingencies; but no one doubts their obligation, on that account. *Gerhard v. Bates*, (75 *Eng. Com. Law*, 475;) *Biddle v. Levy*, (2 *id.* 20;) *Seaman v. Low*, (4 *Boers.* 337,) are cases in which the representation was as to something to happen, or to be done, yet it was held to be actionable.

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It is conceded by the defendant's counsel that there are cases in which a representation as to something in the future may, if fraudulent, be the basis of an action. But to establish fraud in such case, it must be proved that the person who made the representation knew when he made it that there was no ground for believing that the event to occur, or thing to be done, would be done or occur.

When a man represents to the public that he owns land on a stream which can be made a valuable mill site by purchasing the right to flow his neighbor's land above him, on the same stream, which he avers he is about to do, and offers the land, with the right to flow the neighbor's land, and he sells for a gross sum both the land and the right, is not the purchaser induced to make the contract on the strength of a representation as to a thing thereafter to be done by him? In such a case there is no actual fraudulent intent in the seller. But is not the purchaser injured, just as much as if the sale was procured with the most corrupt intent? Why the question of intent or knowledge should ever have been permitted to enter into such cases, unless to enhance the damages, I cannot comprehend. The question, and the only question, should be, was the representation such as that a prudent man should rely upon it, or was it mere matter of opinion or conjecture in regard to matters as to which no man is justified in dealing upon the opinion of others. If the latter, there is no liability; as to the former, there is.

In the case supposed, would the damage to the purchaser be any greater because the vendor knew, when he made the representation as to his ability to acquire the right to flow his neighbor's land, that such right could not be obtained. The moral wrong may be greater; the legal wrong is not increased a jot.

A principal question here is whether an individual, or corporation, is liable for the fraud of his or its agent. If, as is contended for by the counsel for the defendant, it is

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necessary to show knowledge on the part of the agent, of the falsity of a representation made by him, or an intent to defraud the person with whom he is dealing, in addition to the fact that the representation was not true, in order to recover, the question then is, not so much the truth or falsity of the representation—not the motive and intent of the real party to the contract, but of the state of mind of the agent. For the *intent* of the agent, the principal cannot be liable; for the truth or falsity of the representation, he is liable.

When the representation relates to something to be done in the future, and the representation has induced the other party to enter into the contract, to require proof that the agent knew, when he made it, that there was no ground for believing that the act could or would be done, is to make the mental operations or condition of the agent the test of liability, instead of the truth of the representation. Such a rule is unsupported by any principle which should be permitted to regulate the affairs of men.

I am aware that in England and in this country the courts of law have required proof, in order to authorize a recovery, that the person making the representation knew it to be false, or intended to cheat the person with whom he was dealing. It was occasionally held that knowledge or intent need not be proved; that falsity of the representation was enough. The courts of equity, on the other hand, uniformly gave relief when the representation was shown to be false, provided it was material and induced the other party to enter into the contract, or do some other act to his prejudice. In other words, the courts of law required moral fraud to be established. Courts of equity only required legal fraud.

In *Bennett v. Judson*, (21 *N. Y. Rep.* 238,) the Court of Appeals applied the rule in equity to actions at law, and has thus swept away the great mass of cases in which knowledge of the falsity of the representation or fraud-

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ulent intent on the part of the person making it must be proved, in order to entitle the injured party to recover.

The case of *Bennett v. Judson* has no application to a class of cases of frequent occurrence, such as representations of matters of which the person making them cannot be presumed to have any personal knowledge, and as to which he is understood to speak from information derived from others. In such cases, the person making the representation is only liable to relate truthfully what he has heard, or to give his opinion honestly if he speaks of matter of opinion merely. To this class of cases belong representations as to solvency, character, and other matters of the same or similar description. In these cases, in order to recover, it must be proved either that the defendant knew the representation was false, when he made it, or that, not knowing whether it was true or false, he made it with intent to defraud.

In *Bennett v. Judson*, a representation is held to be fraudulent when it is proved to be untrue, and the person making it did not know, when he made it, whether it was true or false.

It follows from these considerations that if the representation was of an existing fact, it was not necessary for the plaintiff to prove any thing beyond the untruth of the representation; knowledge on the part of the agent as to its truth being wholly immaterial. This was the very point decided in *Bennett v. Judson*. If the representation is to be considered an assertion that the Hammond well &c. would be acquired, and it having been found that this representation was so far material that the plaintiff would not have entered into the contract had it not been made, then it was such a representation as, being found to be untrue, entitled the plaintiff to rescind the contract and to receive back the money paid.

It would be the highest injustice to hold a person bound by a contract when he fails to acquire by virtue of it the

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very thing which he entered into the contract to obtain. It is not in such a case that the injured party is turned over to an action to recover, because of a partial failure of consideration.

In *Flight v. Booth*, (1 Bing. N. C. 370,) a lease was sold at auction, of which a description was given before and at the sale. The plaintiff purchased, but on finding that it did not answer the description, he refused to complete the purchase, and sued to recover the money paid at the time of the sale; and it was held that he was entitled to rescind the contract and recover what he had paid. Here it may be said the contract was executory, and in such case he may rescind, but the right does not exist in the case of an executed contract. In that case he can only sue for damages. Such is undoubtedly the rule when no fraud is charged; but when that exists, then, whether it is executed or executory, the party may rescind; and in *Flight v. Booth* it was held that "it was a safe rule to adopt that when the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject matter of the contract, that it may reasonably be supposed that but for such misdescription the purchaser might not have entered into the contract, in such case the contract is altogether avoided."

If the contract could be rescinded in that case, why not in this? A false description is but a false representation. The effect in both is to defraud, and the rights of the injured party should be the same.

I have already extended the discussion of the questions arising on this appeal far beyond what I intended when I began; but some of the questions are both novel and important, and rendered necessary a more extended discussion than the amount in controversy would otherwise justify.

The defendant's counsel has made no point upon the

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refusals to charge as requested, and I do not, therefore, deem it necessary to consider them.

With the most profound respect for the opinion of my brother Peckham, I cannot concur with him in his opinion, that when a man is led into the purchase of stock of a corporation, on the representation that it owns or will own property that would make the stock valuable, and without which it would not be, he must retain his stock and submit to the wrong, although it turns out that it never acquired such property, and the stock is not valueless, but of vastly less value than it would have been had the property been acquired.

Brother Peckham seems to think that because the wells in the oil region were uncertain, as to the quantity they would yield, and the length of time they furnish oil, therefore the representation must be held to be matter of opinion merely, and hence the defendant not liable. If the representation relied on was as to the quantity of oil to be produced, or the durability of the well, he would probably be right; but that is not the representation. It is that *the company owns or will acquire wells that are yielding a certain number of barrels per day*. That representation is untrue, and hence the plaintiff has not received stock of the value it would have been had the company acquired the property.

Nor is it an answer, now, that the property to be acquired, and not acquired, has proved to be of little or no value. The rights of the parties were fixed at the time of making the contract, or at latest, when it was ascertained that the title could not be acquired. The right then attached, to rescind the contract, and it has never been waived or abandoned.

Brother Peckham thinks that the plaintiff is not damaged, because \$75,000 was retained in the treasury to make good the loss of the Hammond well. It would be interesting to know how that \$75,000 got into the treasury, if

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it be true that the land was paid for in stock. Why was not the stock kept back by money? Who fixed the price of the Hammond well, which was, by the prospectus, by far the best of all the wells mentioned in it?

But I am not aware that a defendant who is sued for fraudulent representations can escape liability by showing that although they were false, yet he deposited money to an amount equal to the value of the property as to which the representation was made. The plaintiff had the right to have the identical property which it was represented the company would own or did then own; and he never authorized any person to settle with the wrongdoer for the depreciation of the value of his stock.

I am in favor of affirming the judgment.

Judgment reversed.

[NEW YORK GENERAL TERM, June 7, 1869. *J. F. Barnard, Mullin and Peckham*, Justices.]

OLIVER E. WOOD and others vs. JACOB L. BACH and others.

Where persons acknowledging the execution of an instrument, although previously unknown to the officer, are introduced to him by a mutual acquaintance, this, if it satisfies the conscience of the officer as to the identity of the parties, is sufficient to authorize him to take the acknowledgment and give the certificate. *CLERKE, P. J.*, dissented.

Although the statute requires that the officer taking an acknowledgment shall know, or have satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed the instrument, yet it nowhere prescribes either how such knowledge shall have been acquired, or that it must have existed for any definite period of time. *PER CARDozo, J.*

That is necessarily a question for the conscience of the officer; and the means through which he obtains knowledge of the person's identity are not material.

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The right of the officer to take the acknowledgment does not depend upon the length of his acquaintance with the person, nor upon the manner in which his knowledge is acquired.

APPEAL by the defendants from a judgment entered at a special term, on a trial before the court without a jury.

This action is in the nature of a judgment creditors' bill, and is brought against the judgment debtors and their assignee, to set aside a certain assignment made on the 1st day of August, 1866, and for a receiver. The ground on which this relief is sought is set forth in the complaint in these words: "That the said assignment was made by the said defendants, Jacob L. Bach and Lewis Bach, with the intent to hinder, delay and defraud their creditors; that it was not accompanied with an immediate and continued change of possession of the property assigned; that it is void." The defendants deny, in their answer, the above allegations, and set forth the facts to show that the assignee had duly proceeded with the trust.

On the issues thus raised by the pleadings, the parties proceeded to trial before his honor Judge Clerke, at special term, on the 17th April, 1867.

On the trial, on a question not presented in the pleadings and not at issue in the case, the judge allowed testimony to be given by the plaintiffs against the objection and under the exception of the defendants; and on the testimony thus adduced, the judge decided that the assignment was void as to the plaintiffs. This question was the due acknowledgment of the aforesaid assignment. Peter J. Gage, a notary public of the city and county of New York, an attorney and counselor of this court, took the acknowledgment to said assignments, and certified that at the time he took the acknowledgments of the defendants, on the 1st day of August, 1866, the parties were known to him to be the persons described in and who executed the assignment in question, under the following circum-

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stances: P. J. Joachimsen, Esq., the counsel for the defendants, occupied a suite of offices on the floor below Mr. Gage, in the same building, and they were well acquainted with each other. He sent for Mr. Gage to come and take the acknowledgments of the parties, although he was a commissioner himself, because, from motives of delicacy, being the attorney who drew the assignment, he preferred that another should take acknowledgments. When Mr. Gage came in he introduced the parties to him, and Mr. Gage had not any doubt in his mind, from the introduction, that the persons so introduced were the persons Mr. Joachimsen represented them to be. After such introduction the parties signed the paper in his presence, and at the same time the Messrs. Bach made oath, before Mr. Gage, to the amount of the assigned property, describing themselves to be the above named assignors; and also Messrs. Judah Hart and Isaac Levy executed a bond in the sum of \$25,000, for the faithful discharge by Mr. Kalisher of his duties as such assignee. Messrs. Hart and Levy were present at the time of this introduction, and they were personally known to Mr. Gage. At the time of taking this acknowledgment, Mr. Gage had no doubt as to their identity; and on the trial, more than eight months afterwards, he identified the proper parties as the persons who then came before him. Mr. Joachimsen, for the defendants, corroborated fully the statement of Mr. Gage, and the identity of the parties, and no testimony was given to contradict this; in fact it was fully admitted on the trial, that the defendants in the action were the persons who came before the notary on the day stated; that they were the persons described in and who executed the instrument in question.

The court, at special term, held that legal proof of the identity of the persons appearing before the officer for the purpose of acknowledging the execution of the assignment was necessary, the officer having had no previous

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knowledge of them; and that a mere introduction at the time was not sufficient. Judgment was accordingly given for the plaintiffs. (*See S. C.*, 48 *Barb.* 568, *sub. nomine Jones et al. v. Bach et al.*)

Wm. Henry Arnoux, for the appellants. I. The cause was improperly tried upon a question not at issue in the case. 1. Facts not alleged cannot be proven on the trial. (*Irnham v. Child*, 1 *Bro. C. C.* 94. *McKyring v. Bull*, 16 *N. Y. Rep.* 297, 303. *Morrell v. Irv. Ins. Co.*, 33 *id.* 429, 443.) 2. Facts proven on the trial are not available if not alleged. (*Field v. Mayor*, 6 *N. Y. Rep.* 179, 189. *People v. Ryder*, 12 *id.* 437. *Graser v. Stellwagen*, 25 *id.* 315, 317. *Armitage v. Pulver*, 37 *id.* 494, 500.) The good sense of pleading, and the language of the books, both require that every material allegation should be put in issue by the pleadings, so that the party may be duly apprised of the essential inquiry, and may be enabled to collect testimony and frame interrogatories in order to meet the question. Without the observance of this rule the use of pleading becomes lost, and parties may be taken at the hearing by surprise. (*James v. McKernon*, 6 *John.* 563, *per Kent, Ch. J.*) It is an inexorable rule in the Court of Chancery that no interrogatories can be put to witnesses that do not arise from some fact charged and put in issue. (*Lyon v. Tallmadge*, 14 *John.* 516, *per Spencer, J.*) It is a rule so necessary and just, to prevent surprise upon either party, as not to stand in need of any argument to enforce or elucidate it. (*Ferguson v. Ferguson*, 2 *N. Y. Rep.* 360, 361, *per Jewett, Ch. J.*) In England, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprise each other of the precise grounds upon which they intend to rely; and the system of pleading prescribed by the Code appears to have been conceived in the same spirit. It was evidently designed to require of parties, in all cases, a plain and dis-

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tinct statement of the facts which they intend to prove. (*McKyring v. Bull*, 16 *N. Y. Rep.* 303, *per Selden, J.*) The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleading is to arrive at a specific issue upon a given and material fact. (*People v. Ryder*, 12 *N. Y. Rep.* 437, *per Marvin, J.*) No rule is better settled than that the decree must conform to the allegations as well as to the proofs in the cause. If the pleadings in the cause were to give no notice to the parties or to the court, of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof differing from that stated in the pleadings; all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on the courts. (*Crocket v. Lee*, 7 *Wheat.* 522, *per Marshall, Ch. J.*) 3. No proof can be offered of facts not put in issue by the pleadings, nor can relief be granted for matters not charged therein, for the court pronounces the decree *secundum allegata et probata*. (*Ferguson v. Ferguson*, 2 *N. Y. Rep.* 360, 361. *Kelsey v. Western*, *Id.* 500, 506. *Wright v. Delafield*, 25 *id.* 266, 268. *James v. McKernon*, 6 *John.* 563. *Lyon v. Tallmadge*, 14 *id.* 516. *Crocket v. Lee*, 7 *Wheat.* 522. *Irnham v. Child*, 1 *Bro. C. C.* 94. *Smith v. Clarke*, 12 *Vesey*, 481.) 4. This principle has not been exploded by the Code. It still remains, and cannot be departed from without inextricable confusion and uncertainty, and mischief in the administration of justice. (*Wright v. Delafield*, 25 *N. Y. Rep.* 266, 268, 270. *Woodruff v. Dickie*, 31 *How.* 164.)

II. The court erroneously admitted the evidence as to

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the notary's knowledge of the defendants Bach. 1. There was no fact charged in the complaint on which such interrogatory could be founded. (*James v. McKernon*, 6 *John*. 563. *Lyon v. Tallmadge*, 14 *id.* 516.) 2. The objection and exception were properly made and taken, when the question was propounded to the witness. (*Selden v. Del. and Hudson Co.*, 29 *N. Y. Rep.* 634, 639.)

III. The judgment rendered was against the evidence. 1. The witness Gage was called by the plaintiffs, and they were bound by his testimony. (*Thompson v. Blanchard*, 4 *N. Y. Rep.* 303, 311.) He testified that he was introduced to the Messrs. Bach, and from such introduction and the attendant circumstances, he had no doubt in his own mind that they were proper parties, before he took their acknowledgment. 2. The evidence was conclusive, that the notary did know the Messrs. Bach. The statute, as cited by Judge Clerke in his opinion in this case, requires that the officer taking the acknowledgment shall know the person, &c. It does not say *shall have known*, but it is in the present, *shall know*; that is, shall be personally acquainted with. (*Sheldon v. Stryker*, 42 *Barb.* 284. *S. C.*, 29 *How.* 387.) The officer under this statute acts judicially, but the statute does not undertake to regulate his judicial discretion in this respect. If he adjudges that he is personally acquainted with any individual, and the court perceives that he has acted in good faith in such adjudication, it will not disturb his decision. It leaves him to the forum of his own conscience. (*Dibble v. Rogers*, 13 *Wend.* 537.) What more complete acquaintance can any man have with another than the notary had in this instance? He enters a room wherein there are six persons, with three of whom he is acquainted, one of the three introducing the other three to him; they then execute an assignment, and two of his acquaintances execute a bond for \$25,000 in relation to the subject matter of the assignment; the third is the attorney of the parties.

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3. He had evidence under oath that they were the parties. The Messrs. Bach swore to an affidavit at the same time that they made the acknowledgment, and thereby proved each other, under oath, to be the persons described in and who executed the assignment. 4. Therefore, as matter of law, the assignment was duly acknowledged.

IV. The judgment was erroneous, because the facts upon which the judgment proceeded were not among those stated in the complaint. (*Lewis v. Mott*, 36 N. Y. Rep. 395, 399.)

Fithian, Clark & Smith, for the respondents. I. By the act of 1860, an assignment in trust, for the benefit of creditors, must be duly acknowledged before a competent officer, before delivery; otherwise it is of no effect. (*Fairchilds v. Gwynne*, 16 Abb. 23. *Cook v. Kelley*, 12 id. 37. *Same v. Same*, 14 id. 466.) In this case it was not duly acknowledged by the parties who executed it, under this act. Under this statute the question immediately arose whether a valid assignment could under any circumstances be made, unless signed and acknowledged by all the partners; or, in other words, whether the statute had not so fixed the law that the only evidence that could be given of the assent of a partner to a general assignment, was his execution and acknowledgment of the instrument. In respect to the acknowledgment, it is wholly a question of fact. The judge finds as a matter of fact that at the time of the acknowledgment neither of the assignors was known to the notary, nor did he have any evidence whatever of their identity. The Supreme Court, in the case of *Palmer v. Myers*, (43 Barb. 513,) by straining the statute to its utmost verge in favor of these assignments, held that as to an absconding or absenting partner, he need not execute nor acknowledge; but as to all the partners who actually remain in the custody and control of the partnership business and property, they must all acknowl-

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edge, or the instrument is void. And how acknowledge? Why, in the mode and manner prescribed by the statute, viz., that they shall, each and every of them, acknowledge the execution of the instrument before some officer who shall have had previous personal knowledge of the identity of the persons, and each and all of the persons so acknowledging, or shall then and there take proof of such identity. The officer must know, of his own knowledge, the person making the acknowledgment, or have satisfactory evidence, i. e., by proof of the fact. (1 R. S. 758, §§ 9 and 15, *marginal*. *McAndrew v. Radway*, 34 N. Y. Rep. 512.) It is true that the evidence of identity must be satisfactory to the officer, nor does the statute undertake to regulate the discretion of the officer in this respect. But the difficulty in the case at bar is, that there was no evidence upon which the officer could properly act, or which called for an exercise of his judicial discretion. Now it must be conceded, and will not and cannot be controverted in this case, that the officer before whom this acknowledgment was attempted to be taken, did not take proof as to the identity of the persons who assumed to acknowledge before him. Then did he have previous personal knowledge of their and each of their identity? The evidence is conclusive that he had no knowledge whatever. He had never seen their faces before, and the evidence of the notary himself is entirely satisfactory that he had not such knowledge of their identity as the statute requires. If he did not then know them, the statute requires him to take proof, on oath, of their identity, before he shall have any power to take the acknowledgment. It is not enough to say that the officer was satisfied in his own mind of the identity of the persons. The very object and purpose of this statute, relative to acknowledgments, was to guard against false personations and impositions upon the officer. And it is not sufficient that the officer shall rest satisfied with such information of identity as may be satisfactory,

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real or pretended, to a careless or credulous or unscrupulous person, but he shall have such knowledge as establishes the fact of identity, not only to him, but to all persons and courts, and other officers, wherever his certificate may be presented. And if he has not such knowledge, he must take proof, or the acknowledgment and his certificate are void and of no effect. (1 R. S. *above cited*. *Watson v. Campbell*, 28 Barb. 421.) By referring to the testimony of the notary, it will be seen that he did not take any proof, and he had no personal knowledge of either of the assignors. It is not a question here, whether an acknowledgment was in fact made by the assignors, but whether, under the Revised Statutes and the proofs in this case, the officer had any authority or power whatever to take the acknowledgment. The object which the statute intended to effect would wholly fail if the acknowledgment in this case was held good. Judge Clerke's findings of facts are not without evidence to support them; nor are they clearly against evidence. His findings must, therefore, be deemed conclusive. (*Loeschigk v. Peck*, 3 Rob. 700.)

II. The assignment is void, because it was made with the intent to hinder and delay creditors. The special term should have set aside the assignment on this ground, as well as the other. The authority of the general term upon appeals from the special term is not confined to a simple reversal or affirmance, but it may make such order as the special term should have made in the first instance. (*Howard v. Freeman*, 3 Abb. Pr., new series, 292.)

CARDOZO, J. I am not able to concur in the view of this case taken by the learned judge before whom it was tried. The statute requires that an officer taking an acknowledgment shall know, or have satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed the conveyance;

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but it nowhere prescribes either how such knowledge shall have been acquired, nor that it must have existed for any definite period of time. That being so, who shall fix a rule by which it shall be determined whether the commissioner was justified either by the length of his acquaintance, or the method of forming it, in certifying that he knew the party? Must it not necessarily be a question for the conscience of the officer taking the acknowledgment, and is not that just where the statute meant to leave it, if there were any thing at all upon which the officer's conscience could be called upon to act? As no specific period of prior acquaintance is fixed by the statute, who shall say that one month would not be sufficient if the officer taking the acknowledgment so regarded it? And if one month, why not an hour, or the moment at which the acknowledgment is taken? It is clear that the right to take the acknowledgment does not depend upon the length of the officer's acquaintance with the person. Is that right dependent on the manner in which the officer's knowledge is acquired? The statute does not say so. The means through which the officer obtains knowledge of the person's identity are not material. One officer might consider a person known to him through a method that another might entirely reject. But in this case the usual means of knowledge were acted on and received by the officer as sufficient.

Knowledge of persons and their identity is most frequently acquired by introduction through mutual friends, and when such introduction has taken place the parties certainly know each other. Every day men, in social life, thus become known to each other, and I never heard that such an introduction was not sufficient, or that any length of time after it must elapse, to justify a statement or certificate that they were acquainted. When an introduction does not proceed from such a source as satisfies the officer's conscience, undoubtedly he should not certify that he

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knows the party, but should require "evidence" which, of course, must be on oath; but when the character of the introducer—whom the officer knows—conveys knowledge to the officer's conscience, he may well be satisfied and may properly give the certificate.

In this case the parties making the acknowledgment were introduced to the officer, the ordinary way of becoming known, by one in whom he had such confidence that "he had no doubt" that they were the persons they purported to be. Upon that, in social life, he would have been regarded as knowing them, and knowing them in social life he had the right, if his own conscience were convinced, from that knowledge of their identity, to take their acknowledgment in his official capacity. Suppose these persons had been introduced to the notary by the same gentleman a week before, and that they had gone to him when they made the assignment, and he had taken their acknowledgment, will any body pretend that he could not certify that he knew them? That case does not differ in principle from this.

I think the learned judge not only erred, therefore, in his view of the demands of the statute, but that so much of his third finding of fact as holds upon the undisputed testimony of introduction by a person known to him and in whom he had confidence, that the grantors were not known to the notary, is against evidence, and cannot be sustained. I do not think the suggestion that allowing acknowledgments to be taken under such circumstances may lead to frauds and false personations, entitled to much weight. Certainly when the officer relies upon the introduction made by a friend whom he knows, there is not more danger of imposition than when he acts upon oath, as he may do, of an entire stranger. If parties desire to personate others, there is much more probability of it being done through the medium of the oath of a stranger, experience having shown that persons willing to commit

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perjury for such purposes are not difficult to be found, than that it will be accomplished through the instrumentality of an introduction by a respectable friend to a reputable officer; while, again, if the officer himself be corrupt, requiring that he shall take evidence, will not prove much more of a safeguard than if he certified without proof.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

GEO. G. BARNARD, J., concurred.

CLERKE, P. J., dissented.

New trial granted.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Cardozo and Geo. G. Barnard, Justices.*]

THE PEOPLE, *ex rel.* JOHN MARTINO and others, *vs.* THE
BOARD OF COMMISSIONERS OF PILOTS.

On a common law certiorari the Supreme Court is not restricted to the inquiry whether the court below acted within its jurisdiction, but may go further, and examine whether any error in the proceedings has been committed.

The board of commissioners of pilots, after having granted new licenses to individuals, authorizing them to act as pilots for one year, cannot revoke such licenses for an alleged violation of rules occurring previous to the date of the new licenses.

By considering applications for new licenses, and determining to issue such licenses to the applicants, the board will be deemed to have waived and forgiven all previous offenses.

ON the 25th day of August, 1868, the relators were summoned to appear before the board of commissioners of pilots, to answer to a complaint made by a member of the board, for several breaches of the regulations of the board alleged to have been committed at different times from the 16th of June to the 24th of August of that year.

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Such proceedings were had on that complaint, that on the 1st day of December, 1868, the board revoked the licenses of the relators as Sandy Hook pilots, which action of the board was on the 22d day of December affirmed, on appeal to the commissioners.

After the complaint was made to the commissioners, and before adjudication thereon, the board of commissioners, before whom the complaint was pending, granted to each of the relators, severally, a license for the term of one year from date, which licenses were dated, respectively, September 6, September 13 and October 18, 1868. The licenses held by the relators at the time of the complaint having expired on those days respectively.

The relator sued out a common law certiorari, for the purpose of reversing the judgment of the board, by which the said licenses were revoked.

E. Cooke, for the relators. I. The commissioners have no power to revoke the license of a pilot, except for cause, to wit, malfeasance in office. (*Laws of 1853, pp. 926, 927, §§ 23, 25.*) It is obvious that the malfeasance or neglect of duty, to work a forfeiture of his license, must be laid at a time covered by the license. The acts charged against the relators in this case, and for which the licenses were revoked, having been committed, if at all, before the granting of the licenses, the judgment was erroneous, and should be reversed.

II. The granting of licenses to the relators after the commencement of the proceedings against them, being a judicial act, was a waiver and discontinuance of the proceedings. The judgment afterwards rendered was, therefore, as unauthorized as if no proceedings by complaint and notice had been instituted at all.

III. The notice was insufficient under the statute. It should specify the *nature* and *substance* of the complaint. (*Laws of 1853, § 25.*) This language calls for a statement

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of such facts as constitute an offense. The notice is palpably deficient, for the reasons set forth in the notice of appeal. These defects are not cured by the reference to the by-laws. These by-laws are not public statutes, nor were they even brought to the knowledge of the relators. They should have been set forth so far as to show that the acts charged were a violation of them.

IV. The statute requires a complaint to be made in writing to the commissioners, as a foundation of the proceedings. (§§ 24, 25.) And then the commissioners are the court to try that complaint. A complaint and a court are thus provided for. It is clearly against the spirit of the statute to unite the two functions in one body. A member of the court cannot be complainant. The complaint, therefore, having been made by Mr. Blunt, one of the members of the board, is a nullity, and affords no valid foundation to the proceedings.

V. The commissioners of pilots had no power, nor could the legislature confer on them power to enact the by-laws claimed to have been violated. The commissioners do not hold their office from the people of the district, or by appointment from officers elected by the people. They are the creatures of the chamber of commerce and the board of underwriters—two corporations not chosen by or responsible to the people. In *Schuster v. The Metropolitan Board of Health*, (49 Barb. 454,) this court says: "The power of local legislation may be conferred upon municipal corporations or officers. But those upon whom the power is conferred, must hold their offices from the people of the municipality or district, or by appointment from officers elected by such municipality or district." Upon this principle this court restrained the board of health from enforcing ordinances made by themselves, Leonard, J., saying, "They are not officers holding, from a source permitting the exercise of local legislation to be conferred on them." In *The People v. The Metropolitan*

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Police Comm'rs, (22 *How. Pr.* 52,) the court held that the board, for the reasons before stated, had no power to pass an ordinance regulating the licensing of cartmen and hackmen. And this decision was affirmed by the Court of Appeals.

VI. The commissioners of pilots were elected to office in violation of article 10, section 2 of the constitution of this State, and had no power to entertain the proceedings.

Barney, Butler & Parsons, for the respondents.

By the Court, CARDOZO, J. On a common law certiorari this court is not restricted to the inquiry whether the court below acted within its jurisdiction, but may go further, and examine whether any error in the proceedings has been committed. (*The People v. The Board of Met. Police*, 39 *N. Y. Rep.* 506.)

Looking into the record before us, I fail to find any reason or principle which will justify the board in revoking licenses issued in September and October, 1868, for an alleged violation of rules occurring between the 16th of June and the 24th of August, 1868. It matters not what motive may have induced the commissioners to grant the new licenses; the moment they were issued the relators became clothed with new rights, viz., the right to act as pilots for one year from September or October, 1868. The board must be assumed to have conceded, when they issued the new licenses, that there was no cause why the relators should not then be licensed, and as no cause has since occurred, the board had no ground to proceed against the relators as respects the new licenses.

If, in 1858, the relators had been licensed and had violated some rule, but ten years afterwards, in 1868, the board had seen fit to license them again, can it be pretended that the alleged violation would not be deemed to have been waived, and that the rights of the relators, under

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the licenses, could not for that old cause be disturbed? The time elapsing between the alleged offense and the granting of the new license cannot affect the principle. Whether it be ten years or one day, the effect must be the same.

The justice of this view is also apparent from the fact that by section 11 the relators are obliged to enter into a recognizance, with two sureties, before getting their license. It would be very unfair to subject them to the labor and inconvenience of furnishing that recognizance, and then for the board to turn around and immediately revoke the license, for an old matter which the relators might reasonably suppose had been forgiven when their application for a new license was considered and determined favorably to them by the board.

Without examining any of the other questions, on this one ground, I am for reversing the proceedings below.

Proceedings reversed.

[NEW YORK GENERAL TERM, JUNE 7, 1869. *Clark, Cardozo and Geo. G. Bernard, Justices.*]

DARLING and others vs. ISAAC MILLER.

Although a letter, written by a third person to the plaintiff, is not competent as proof of the truth of the facts stated in it, yet it is admissible to show under what cover its contents reached the plaintiff; precisely as an envelope would be admissible as having contained a certain letter. *CLARKE, P. J.*, dissented.

THIS action was brought to recover the proceeds of a draft, dated 16th March, 1861, made by John C. Miller on the plaintiffs, accepted by them, payable at two months, to the order of and indorsed by the defendant, discounted

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by a bank in Rochester, and which proceeds the complaint alleges the defendant wrongfully appropriated and converted to his own use. The defendant put in an answer in which he admits the making of the draft, his indorsement of the same for the accommodation of the drawers and drawees, the procurement by John C. Miller of the same to be discounted, and alleges the appropriation of the proceeds by John C. Miller to his own use, and denies all other material allegations in the complaint.

The cause was tried at the New York circuit, before a justice of this court and a jury. Leander Darling, one of the plaintiffs, was examined as a witness in their behalf, and testified: "I received the draft for \$1952.49, (marked No. 1,) by mail." The witness was here shown a paper, and testified: "This paper last shown me is the letter in which the draft came to us." This was a letter signed by the defendant dated Clyde, March 25, 1861, and addressed to the plaintiffs. The plaintiffs' counsel offered the letter in evidence, to which evidence the defendant's counsel objected, on the grounds:

"*First.* The letter is hearsay; the statements contained in it are the declarations, merely, of a person not a party to the action, and his declarations are not competent proof of the facts stated in the letter.

"*Second.* The statements contained in the letter offered, that the accompanying draft was the avails of a \$2000 draft, are incompetent and improper evidence to disprove the fact that the \$1952.49 was, in fact, part of the avails of the \$3000 draft in question."

The court overruled the objections so made, and allowed the plaintiffs to read said letter in evidence; and to each of the said rulings the defendant's counsel excepted; and said letter was thereupon received by the court and read as evidence. The other facts sufficiently appear in the dissenting opinion of CLERKE, P. J.

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H. B. Stanton, for the plaintiffs.

Thomas Nelson, for the defendant.

CARDOZO, J. I think the letter was competent, not as proof of the truth of the facts stated in it, but to show under what cover its contents reached the plaintiffs—precisely as an envelope would be admissible as having contained a certain letter.

I think the judgment should be affirmed.

GEO. G. BARNARD, J., concurred.

CLERKE, P. J., (dissenting.) The only question worthy of deliberation is that raised by the exception of the defendant's counsel, found at folio 98 of the case. The action was brought to recover the proceeds of a draft made by John C. Miller on the plaintiffs, to the order of the defendant, accepted by them, and indorsed by the defendant. The complaint alleges that the draft was discounted for the plaintiffs by a bank in Rochester, and that the proceeds (\$3000) were wrongfully appropriated, and converted to his own use, by the defendant. The defendant admits the making and acceptance, indorsement and discounting of the draft; but denies the appropriation of the proceeds, by him, and alleges that the same were appropriated by John C. Miller, for whose accommodation, as well as for that of the plaintiffs, the draft was indorsed by him.

The defendant's counsel endeavored to prove, at the trial, that the plaintiffs had in fact received the proceeds of the draft in question, \$2952.29, (the proceeds after deducting discount,) by two drafts drawn by the cashier of the Rochester Bank on the Metropolitan Bank of New York, and indorsed by John C. Miller; one for \$1000, the other for \$1952.49. The plaintiffs' counsel, for the

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purpose of disputing the allegation that these drafts were received by them as the proceeds of the \$3000 draft, offered a letter written by John C. Miller, from which it appeared that the draft for \$1952.49 consisted of the proceeds of a draft for \$2000, made on a different occasion.

The plaintiffs had a right, of course, to disprove the allegation that the draft for \$1952.49 was a part of the proceeds of the \$3000, by showing that it consisted of the proceeds of a totally different draft. But could he show this by the unsworn oral declaration of John C. Miller? Certainly not. Does the unsworn written declaration to the same effect make the evidence any better? It was not shown that the defendant authorized John C. Miller to make the declaration, or that he afterwards admitted it to be true.

It could not be pretended that this hearsay evidence was a part of the *res gestæ*. It was not a part of the transaction which was the subject of inquiry. It did not characterize a particular act, or the intention of the person who did the act; but the letter was produced for the purpose of showing that after the alleged appropriation of the proceeds of the \$3000 draft, by the defendant, the plaintiff had received no portion of it. This could not be done by the unsworn declaration of John C. Miller, oral or written. The best and only way in which that could be done was by producing and swearing John C. Miller as a witness.

The introduction of this illegal evidence was calculated to influence the jury adversely against the defendant, and, consequently, affected his substantial rights.

For this reason the judgment should be reversed, and a new trial ordered; costs to abide the event.

Judgment affirmed.

[NEW YORK GENERAL TERM, JUNE 7, 1869. *Clerke, Cardoso and Geo. G. Barnard, Justices.*]

PHILLIPS vs. SUYDAM and others.

Although section 172 of the Code gives to a defendant the right to serve an amended answer as of course, within the time therein prescribed, yet this right may be waived.

A party, except perhaps in certain instances where the public have an interest, may always waive a right to which he is entitled; and such waiver may be either by an express stipulation, or by doing some act inconsistent with an intention to claim his right.

When a party notices a cause for trial upon the pleadings as they stand, he will be considered as waiving the right to amend his pleading as of course, and will be regarded as having elected to stand by the issue as then framed. CLERKE, P. J., dissented.

A PPEAL by the defendants from an order made at a special term, denying a motion made by the defendants for an order requiring the plaintiff's attorney to receive an amended answer setting up the defense of usury. The action was upon a promissory note made by one of the defendants and indorsed by the others. The answer in question was served upon the plaintiff's attorney before the expiration of twenty days from the service of the original answer, and after both parties had noticed the action for trial. The plaintiff's attorney declined receiving the amended answer, on the ground that the defendants, by noticing the cause for trial, had waived their right to amend.

Justice INGRAHAM, before whom the motion was made, denied the same, for the following reasons: "Noticing the cause for trial prevented an amendment of the pleadings of the party giving the notice. The answer shows no defense, except that of usury. Under the circumstances of this case, the defendants should not be allowed to make that defense."

P. W. Wildey, for the appellants.

J. B. Elwood, for the respondent.

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CARDOZO, J. The 172d section of the Code undoubtedly gives the right to serve an amended pleading, as of course, within the time therein prescribed; but a party, except perhaps in certain instances where the public have an interest, may always waive a right to which he is entitled, and such waiver may be either by an express stipulation or by doing some act inconsistent with an intention to claim his right. When a party notices a cause upon the pleadings as they stand, I think he must be considered as waiving the right to amend his pleading as of course, and must be regarded as having elected to stand by the issue as then framed.

I think the order below should be affirmed, with costs.

GEO. G. BARNARD, J., concurred.

CLERKE, P. J., (dissenting.) The defendants served an amended answer within twenty days after the service of the previous answer; but they had also served a notice of trial before they served the amended answer. Any pleading, according to the Code of Procedure, (§ 172,) may be once amended by the party as of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served. The defendants, therefore, had a clear right to serve their amended answer; unless the service of a notice of trial by them was a waiver of that right.

Formerly, by successive rules of this court, this right was restricted and qualified; so that, for instance, a defendant could not have put in a totally new plea or defense without leave. He could only reform the plea which he had put in. But, by successive changes of the rules, before 1847, and similar changes in the Code, since, the right became absolute and unrestricted. (*See Macqueen v. Babcock*, 13 Abb. 268.) As section 172 now stands, therefore, whatever may be the nature of the defense set up in the

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new answer, the defendant cannot be deprived of this right; and if he serves it within the prescribed time, the service of a notice of trial by him, or any other similar action of his, will not operate as a waiver, unless the plaintiff has been damnified by it; as, for instance, by throwing the case over a circuit. Nothing of the kind appears to have happened in this case; and, in my opinion, the defendants have not lost the right given to them by section 172, merely by having noticed the cause for trial; as it threw no impediments in the way of the plaintiff's proceedings previous to the trial, did not prejudice them in any way, and did not postpone the trial a single day.

The order should be reversed, with costs.

Order affirmed.

[NEW YORK GENERAL TERM, June 7, 1869, *Clark, Cardoso and Geo. G. Barnard*, Justices.]

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CRATER vs. BININGER.

Where a note, made by one member of a joint stock association and indorsed by another for the purpose of raising money for the use of the association, is paid and taken up by a third, the latter cannot maintain an action against the maker and first indorser, to recover back the money advanced by him, until an account has been taken between the parties.

THIS action is brought upon a promissory note for \$1100, made by the defendant, dated November 17, 1865, payable four months from date, to the order of one W. P. Sanger, and alleged to have been indorsed by him for value to the plaintiff. The amount claimed to be due upon the note was \$735.39, and interest from March 20, 1866.

The plaintiff and defendant, with six other persons, formed a joint stock association (unincorporated) under

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the name of "The Oil Creek Island Petroleum Company," for the purpose of boring for oil in Venango county, Pa. The company became indebted to J. J. Sutter and another person in the sum of \$1067.71, for labor and materials in putting down a well, and were pressed for payment. They held notes due by other parties, to whom the company had sold property to the amount of \$11,000, but these had some time yet to run, and Sutter refused to wait. The note in suit was thereupon made by the defendant Bininger and indorsed by one Sanger and the plaintiff, each of whom were trustees of the company, and the latter its treasurer, with the intent and for the purpose of raising the money upon it to pay off this indebtedness, and for no other purpose. It was drawn for the amount of the indebtedness, and so timed as to fall due a few days after the larger notes of \$11,000 were to mature, with the intention that it should be paid from the proceeds of such larger notes, but there was an "understanding" that the three parties would take care of the note in any event. Crater, the plaintiff, procured the note to be discounted by a bank in Newark, N. J., of which he was teller, and the proceeds being remitted to Bininger, and by him handed to Sanger, were wholly applied by the latter to the payment of this indebtedness, and to no other purpose.

When the note matured, Crater, the plaintiff, without being requested so to do by any party, took up the note from the bank, and the same day Bininger, the defendant, paid him one third of the amount thereof, \$366.33, and the plaintiff brought this action against Bininger alone, to recover the whole amount of the balance.

The action was tried at special term before a justice of this court and a jury. At the close of the evidence the court held that there was no question of fact to be submitted to the jury; that the case presented only a question of law, and this the court reserved for advisement and discharged the jury; and subsequently the court gave judg-

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ment for the plaintiff for \$733.67, and interest from the 20th day of March, 1866.

The defendant excepted to the decision and finding of the court:

1st. That the note in question was indorsed by the defendant and Sanger, and delivered by him and Sanger to the plaintiff for value.

2d. That the plaintiff is the lawful owner and holder of the note as against the defendant.

3d. That any indebtedness whatever existed at any time from the defendant to the plaintiff.

4th. That any liability arose from the defendant to the plaintiff by reason of the giving of the note in suit, or by reason of any of the matters contained in the evidence.

5th. To each finding and conclusion of law upon the evidence, on the trial.

A. P. Whitehead, for the plaintiff. I. The court properly refused to consider testimony of an alleged oral agreement, contemporaneous with the making of the note, by which its terms would be varied. It is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from the absolute terms of the written contract. (*Chitty on Bills*, 47. *Hoare v. Graham*, 3 Camp. 57. *Rutland's case*, 5 Rep. 25. 2 *Parsons on Bills and Notes*, 501. *Sice v. Cunningham*, 1 Cowen, 397. *Babson v. Webber*, 9 Pick. 163. *Eaves v. Henderson*, 17 Wend. 190. *Ely v. Kilborn*, 5 Denio, 514. *Gridley v. Dole*, 4 Comst. 486.)

II. The only exceptions to the foregoing rule are cases of fraud, mistake, or want of consideration. No question of fraud or mistake is raised, and the testimony shows a good consideration for the note. Assume that the sum of \$1100, for which it was given, was made up of a bill of

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John J. Sutter against the defendant and Sanger and others composing the oil association, a bill of Lock, Hamilton & Co., and a bill against the defendant and Sanger (the payee) alone. The defendant having given his note to raise money to pay this debt, and obtained the money from the plaintiff and paid it out, has received a good consideration, even if no part of the \$1100 had been his private debt. The plaintiff was under no legal or moral obligation to the defendant to advance money. He owed him nothing. And if he advanced the money to pay this debt, he had the right to prescribe the conditions upon which he would part with the money, and to exact the security as the means of obtaining it, to wit, the defendant's note. The defendant on an accounting, aside from this note, for all that appears, would owe the plaintiff moneys. If it be admitted that the plaintiff was liable to pay part of the \$1100, the case of *Gridley v. Dole* is identical in principle with this case and overrules the defense. (*Van Ness v. Forrest*, 8 Cranch, 30. *Gridley v. Dole*, 4 Comst. 486-492.)

S. E. Church, for the defendant. I. A joint stock association, unincorporated, is a simple copartnership, and its members have the general rights and liabilities of copartners. (19 *Wend.* 424. 5 *Hill*, 478. 18 *Barb.* 584. 19 *id.* 517.)

II. This action is between the original parties to the note. There are no rights of *bona fide* holders intervening, and it is therefore open to a full inquiry into the consideration and the equities existing between them. (*Story on Bills*, § 187. 3 *Kent's Com.* 80. 4 *John.* 296. 17 *id.* 301. 19 *id.* 53. 7 *Cowen*, 322. 9 *Wend.* 273. 13 *id.* 605. 2 *Hall*, 459.)

III. The note being given for a common benefit, had no legal inception until it was discounted by the Newark Bank. (20 *John.* 288. 27 *Barb.* 576.) The bank might

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have recovered upon it as a *bona fide* holder without notice; but when the plaintiff took it up, he did so with all the knowledge he had before, and with full knowledge both of the purpose for which it was made, and the use to which its proceeds had been applied. He did not acquire the rights of the bank, because he was himself an original debtor. In his letter he says: "Enclosed please find my check on Second National Bank, Newark, for \$1073.50, being the proceeds of note for \$1100, for the benefit of the Oil Creek Island Petroleum Company, which will enable you to pay the bill of J. J. Sutter," &c.

IV. The debt to which the money was applied was a partnership debt, which all the partners, the plaintiff included, were equally liable to pay. The note was a mere device for their accommodation, to raise money immediately, it being contemplated that assets to be received belonging to the company would provide for its payment. There was nothing in the relation of the parties either to the debt or to the company, or to each other, that required that these three persons should be the ones to make the note, or that their names should stand upon it in the order of maker and indorsers, as they did. The selection of persons, and the order of their names, was purely the accident or convenience of the arrangement, and was for the equal benefit of all concerned.

As between the parties, therefore, the law looking to the substance of the transaction, and not its form, will regard their real relations, and treat them as equal and common debtors, without any superiority of right or equity whatever, as against each other, but as joint makers of the note.

V. The foundation of all obligations in respect to contracts is the consideration. It is utterly fallacious to say that any consideration whatever has either been paid by the plaintiff Crater, or received by the defendant Bininger, on account of this note. And it is upon this fallacy

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that the plaintiff's whole claim, and, with submission, the decision in the court below, resta. Bininger has not received a dollar, nor was it intended that he should, on account of this note. He did, indeed, receive the check for its proceeds on being discounted, but not for his own use, but simply as a messenger or agent to hand it over to the creditors of the company, which he did. Had he attempted to use the money himself, he might have been enjoined; had he succeeded in using it, he would have been liable for a conversion. It is simply absurd, therefore, to call this a payment to Bininger, or a consideration upon which to found an obligation by him. When Crater, the plaintiff, took up the note, he advanced so much money, not to Bininger, but to the company, and not on the credit of the note, for it was his own note as well as Bininger's, (and the note of neither as between themselves,) but on the credit of the company and for their benefit, for he could advance it on no other.

VI. The note, then, as between the parties, has no existence whatever, except as a mere memorandum, and the position of the parties is simply that of partners who have advanced moneys to the credit and for the benefit of the firm. And in such case the law is well settled, that a partner who advances money for the firm, or overpays his share of the liabilities of the firm, cannot sue his copartners to recover their shares until after an accounting and balance struck. (*Coll. on Part.* §§ 264, 289. *Story's Eq. Jur.* §§ 679, 682. *Story on Part.* §§ 219, 222. *Par. on Part.* 268, note c. 31 *How.* 235. 25 *Barb.* 130. 4 *Comst.* 486. 1 *Wend.* 532. 43 *Barb.* 285. 2 *Caines*, 293. *Par. on Con.* 139. 2 *Durn. & East.* 483. 1 *Wend.* 532. 19 *Barb.* 197. 1 *Hall*, 180, 391. 19 *Wend.* 424. 36 *Barb.* 284. 5 *Cowen*, 688. 1 *Barn. & Cres.* 76. 4 *Mont. & Ch.* 171, 172. 14 *John.* 318. 17 *id.* 80. 6 *Barb.* 537.) In *Sherwood v. Barton*, (36 *Barb.* 284,) a note was given by two partners to a third, for moneys borrowed on account

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of the firm; the note was sued by an indorsee, who was allowed to recover, though he took it after maturity, on the ground (there being no attempted set-off) that the defendants were estopped as to third persons from denying that the note was given for some independent consideration. But the court (Ingraham J.) held that "if the partner had sued on the note he could not have maintained the action, but must have resorted to equity for relief." To the same effect, also, is *Traders' Bank of Rochester v. Bradner*, (43 Barb. 379,) the court saying "a partner cannot sue his associates on a note or bill given by the firm, but must resort to equity;" citing 1 *Story's Eq. Jur.* §§ 679, 682; 5 *Cowen*, 688. *Collyer* states the whole law upon the subject, and the principle upon which it rests, in a few words, viz: "When money is due from one partner to another by simple contract, on the partnership account, payment, except in a few special cases, can only be enforced by application to a court of equity upon a bill filed for an account. Courts of law will not entertain suits of this nature, because it would be useless for one partner to recover what, upon taking a general account amongst all the partners, he might be liable to refund." (§ 264.) The exceptional cases stated are none of them at all like the case at bar. They were either where the claim arose upon matters before the partnership, as on an agreement to furnish capital, (13 *East*, 7,) or where the subject matter was detached from the partnership account, as where one partner, having possession of the funds, agreed to indemnify another for his individual acceptance on the partnership account, (3 *Bing.* 54, but overruled in 1 *Starkie*, 78;) or where a balance was found due one of the partners, accompanied with a promise to pay, (1 *Anstr.* 50;) or when a note was given by one partner for value received, though connected with the partnership accounts, (*Id.*) which were the cases of *Gridley v. Dole*, (4 *Comst.* 486,) and *Van Ness v. Forrest*, (8 *Cranch*, 30.) But it is added, "that

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in no case can money be so recovered which, when the cause of action accrued, might be placed as an item in the partnership account." In the case at bar, aside from the mere form of the note, which, as the action is between the original parties, must give way to an inquiry into the actual transaction itself. There was no lending of money by one partner to another, no promise by one partner to another, no consideration of any kind moving from one party to another, and no equity or right in favor of one against another, which lays any foundation for such an action, or brings it within any of the exceptions stated by *Collyer* to the general rule as laid down by him. If either partner should recover the whole money, he would be liable to pay back again his share of the common debt, upon a bill filed by the party who had to pay it; and this shows the case to be precisely within the reason of the law as stated by *Collyer*, and which is supported by all the authorities. *Gridley v. Dole*, (4 Comst. 486,) so much relied upon by the plaintiff, furnishes no aid to the plaintiff, and is a direct authority for the defendant. Gridley & Dole were partners, and had dissolved. Dole took the assets, and "was to pay off the liabilities." He borrowed of Gridley \$1500 for that purpose, giving his note, with Dole his brother as indorser. The suit was brought after dissolution, against the indorser, who was never a partner. The plaintiff was allowed to recover, the court saying, "the plaintiff, although liable to the creditors of the firm, was under no legal or moral obligation to advance money to his former partner. He owed him nothing. He had therefore a right to prescribe the conditions upon which he would part with the money, and to exact and enforce the securities given to enforce it." But the court expressly recognized the rule, that "if a partner has paid demands against the firm of which he and the maker of the note were members, he could not have recovered, by law, against his copartner,

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for he must then sue upon an implied promise, and until an account of the copartnership was taken, it could not be ascertained whether the plaintiff had or had not paid more than his proportion." (*Per Gardiner, J., citing Coll. § 264; 19 Wend. 424.*) In *Van Ness v. Forrest*, (8 *Cranch*, 30,) a commercial company, consisting of several hundred members, sold merchandise to the defendant, taking his note for the amount, payable to the president of the company. The defendant was also a member of the commercial company, but he bought the goods solely on his own account. The court held that the case did not come at all within the principle that a partner cannot sue his copartner, but was an independent transaction and liability. The court recognized fully the rule, "that at law a partner cannot sue his copartner on a claim growing out of the copartnership, until after a general balance struck on a stated account." There are no conflicting authorities on this subject. The defendant is not liable on this note, because, as between the parties, he is no more the maker of the note than the plaintiff, and because no consideration whatever has moved from the plaintiff to him. If he is liable at all, it is for contribution of his share of the money paid by the plaintiff to the bank, and this contribution he has already made, having paid his full share and more. And if he had not, the plaintiff's advancement was not for the defendant, but for the company, and the authorities are uniform that in such case the plaintiff's only remedy is by a bill filed in equity to account. (*See cases supra.*) *Coll-yer* closes his chapter on this subject by saying, "From all that precedes, it is evident that when one partner has a claim against his copartner for a sum of money due on account of the copartnership, but not constituting the balance of a separate account, or a general balance of all accounts, his only mode of recovering the amount is by bill filed in equity, praying for an account, and usually, also, for a dissolution." (§ 289.)

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There is no legal foundation for the judgment in this case, and it should be reversed.

CARDOZO, J. This case cannot be distinguished in principle from *Gridley v. Dole*, (4 *Conn.* 486,) and therefore the judgment below was right, and should be affirmed, with costs.

CLERKE, P. J. Until *Gridley v. Dole* (4 *N. Y. Rep.* 486) be overruled, judgment must be given for plaintiffs in cases similar to this. I concur.

GEO. G. BARNARD, J., also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Cardozo and Geo. G. Barnard*, Justices.]

HAWK & RUNYON vs. THORN & MARCLAY.

Where one has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value.

Such a cause of action is assignable.

A complaint alleged the sale and delivery to the defendants, by the plaintiff, of a couple of hogs, at a specified price, which remained unpaid; and, for a separate and distinct cause of action, stated that the defendants received and took without rightful authority, one calf, which had been consigned to the plaintiff by a third person, who was the owner thereof; that they sold the same without authority, and received therefor a sum named, which was the value of the calf; and that the claim and demand for the value of said calf had been assigned to the plaintiff by the owner. *Held*, on demurrer, that both causes of action were founded on contract; the one express, and the other implied by law; and were properly joined.

A PPEAL by the defendants from an order made at a special term, overruling a demurrer to the complaint.

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The complaint alleged that on or about the 23d day of January, 1866, at New York, the plaintiffs sold and delivered to the defendants, certain goods, consisting of two hogs weighing 680 pounds, of the value and at the price of twelve cents per pound, and nine other hogs weighing 2497 pounds, of the value and at the price of twelve and a half cents per pound, amounting in all to \$393.73; that the defendants had not paid for said goods, and the sum of \$42.73, with interest since January 23, 1866, was still due and owing by the defendants to the plaintiffs on account of said goods.

And for a second separate and distinct cause of action, the complaint showed that, on or about the 19th day of April, 1866, at New York, the defendants received and took, without rightful authority, one calf, which had been consigned to the plaintiffs by S. P. Gillingham, who was the owner thereof. That the defendants sold the same without authority, and received therefor the sum of \$19.80, or about that sum, which was the value of said calf. That thereupon a cause of action and demand for the sum of money received by the defendants for said calf, which was the fair price and value thereof, accrued to said Gillingham against the defendants. That on or about the 19th day of April, 1866, the said Gillingham, for a good and sufficient consideration, duly sold, assigned, transferred and delivered said claim and demand against said defendants to the plaintiffs, who are now the lawful owners and holders thereof, and the sum of \$19.80, besides interest, is now justly due and owing on account thereof by defendants to plaintiffs. That the defendants had promised to pay said claim and demand, but have hitherto neglected to pay the same, and said claim is wholly unpaid. That at said times, before referred to in the complaint, the plaintiffs were copartners, in the name of Hawk & Runyon, and the defendants were copartners, in the name of Thorn & Marclay. That before the commencement of this action the

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plaintiffs demanded from the defendants payment of each of the claims above set forth, and payment thereof was not made. Wherefore the plaintiffs demanded judgment against said defendants for the sum of \$62.39, with interest.

The defendants demurred to the complaint, on the ground that it appears upon the face thereof that several causes of action have been improperly united—one being a money demand on contract, and the second an action of trover sounding in tort, to recover damages for wrongful conversion. And the defendants demurred to the second cause of action set forth in said complaint, and assigned the following as the ground of such demurrer: 1. That the complaint does not state facts sufficient to constitute a cause of action. 2. That such a cause of action, being a tort, is not assignable in law.

Robert N. Waite, for the appellants. I. The causes of action, being based one in tort and the other in contract, are improperly united in one suit. (*Code*, § 167. *Waller v. Raskan*, 12 *How. Pr.* 30. *Hunter v. Powell*, 15 *id.* 223.) It must be conceded that causes of action arising out of different transactions must be of one of the classes enumerated in sec. 167, and that one cause for contract and one for tort, cannot, under such circumstances, be united. (*Id.* and 16 *How. Pr.* 243.) It cannot be, even if a tort and contract could be united where the tort arose out of the contract, that a complaint upon a contract entered into at one time could be united with a tort committed upon another and subsequent occasion. (*Robinson v. Flint*, 16 *How. Pr.* 243.)

II. In the case of *Chambers v. Lewis* (2 *Hilton* 591 and 595) the court says: "Formerly the tort was waived by bringing an action *in assumpsit*, but, under the present system of pleading, the character of the action, and whether or not the tort is waived, must be determined by the facts stated in the complaint. The prayer for relief may some-

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times determine the question, and, I think, does in this case. The plaintiff prays judgment for the sum of \$640, which is the value of the property detained, with interest. This is precisely what the law of damages would give him in an action to recover for the wrongful detention." In the present case the complaint states the plaintiffs' claim in language usual and necessary in actions of tort. (*Sellar v. Sage*, 12 *How.* 531.)

III. The complaint does not charge that the defendants have received money to or for the use of the plaintiffs. The claim for the unlawful conversion is founded upon a tort; that for goods sold and delivered, upon a contract; they are distinct causes of action, and cannot be joined in the same suit. (*Cobb v. Dows and others*, 9 *Barb.* 230.)

In that case the learned judge, delivering the opinion of the court, says: "Where a complaint is framed for the purpose of recovering the value of property, upon the ground of an unlawful conversion, without charging that the defendants have received money to or for the use of the plaintiff, the plaintiff cannot recover the value of the goods as money had and received to their use. (*See also* 10 *Barb.* 445.)

IV. A tort cannot be assigned. "It never was capable of assignment, either before or after the adoption of the Code." (3 *Kernan*, 334. *Hall v. Robinson*, 2 *Comst.* 293. *Gardner v. Adams*, 12 *Wend.* 297. *People v. Tioga Common Pleas*, 19 *id.* 76. *Thurman v. Wells*, 18 *Barb.* 500.)

V. To enable a party to maintain an action of trover and conversion, which is the second cause of action in the plaintiffs' complaint, the plaintiffs, *at the time of the conversion*, must have property, either general or special, in the thing converted. The complaint shows that the conversion was before the assignment of the cause of action to the plaintiff. (1 *Chit. Pl.* 3d *Am. ed.*, *marg.* p. 150. 2 *Saund. Pl.* 47. *Pyne v. Dor*, 1 *T. R.* 56. *Hall v. Robinson*, 2 *Comst.* 293. *Thurman v. Wells*, 18 *Barb.* 500.)

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Sidney S. Harris, for the respondents. I. The first ground of demurrer is untenable. The first cause of action is on contract, as is also the second. The second cause of action alleges that one Gillingham consigned a calf to the plaintiffs. That the defendants took and received, without authority, said calf, and sold the same, and received therefor the sum of \$19.80, which was the value of the calf. Then, the plaintiffs claim that the moneys so received on the sale of the calf belonged to Gillingham; that said claim of Gillingham was assigned to the plaintiffs. Now, upon this state of facts, Gillingham had a good cause of action against the defendants for the price of the calf. The rule is that when property has been wrongfully taken from the owner and sold, the owner can sue for a conversion, or waive the tort and sue for the money received by the wrong doer. (*Osborn v. Bell*, 5 *Denio*, 370.) The plaintiffs setting forth the matters complained of as being done without rightful authority, does not make the count one for tort. These facts were necessary to be stated to raise a cause of action in assumpsit, as well as a cause of action in tort. (*Hobby ads. Bruce*, 5 *Leg. Obs.* 18.) When property is wrongfully sold, and the proceeds received by the wrongdoer, this raises, in all cases, an implied assumpsit in favor of the owner, based upon the duty of the wrongdoer to account to and pay the owner.

II. The second cause of action states all the facts necessary—the receipt of the calf by the defendants, the sale of the same without authority, the price received, the value of the calf, and an assignment of the same to the plaintiffs. The judgment should be affirmed, with costs.

CARDOZO, J. The objections raised in this case are not tenable. When a person has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value. Such a cause of action is

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assignable. Both causes of action set forth in the complaint are founded on contract, the first express, and the other implied by law, and are properly joined.

The order below was right, and should be affirmed with costs.

GEO. G. BARNARD, J. The demurrer was properly disposed of. The complaint shows that both causes of action arose on contract. They could therefore be properly assigned.

Judgment should be given for the plaintiff, with costs.

CLERKE, P. J., concurred.

Order affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Cardozo and Geo. G. Barnard, Justices.*]

PULLMAN vs. THE MAYOR &c. OF THE CITY OF NEW YORK
and others.

A municipal corporation, like any other, may enter into any contract within the object for which the corporation was created, except where it is restrained by some legal enactment, and except so far as its contracts may be subject nevertheless to its future exercise of its legislative authority.

The act of the legislature, of April 20, 1866, (*Laws of 1866, ch. 876*), being the tax levy for that year, is a private or local bill, within the meaning of the constitution, and section 9 restricting the power of the corporation of New York to make contracts, relates to a subject not expressed in the title of the act, and is therefore unconstitutional. INGRAHAM, J., dissented.

An injunction will not be issued to restrain the corporation of the city of New York from entering into a contract, where there is no valid statute preventing the making of such contract, and the case presents no case justifying the interference of the court on the ground of fraud.

APPEAL from an order made at a special term, denying a motion to dissolve an injunction issued to restrain the execution of a contract entered into by the defendants.

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By the Court, CARDOZO, J. A municipal corporation, like any other, may enter into any contract within the object for which the corporation was created, except where it is restrained by some legal enactment, and except so far as its contracts may be subject nevertheless to its future exercise of its legislative authority. There can be no doubt, therefore, that the contract, which the common council authorized, and which was sought to be restrained by this action, might be lawfully made, unless some valid law exists preventing it, or unless a case of fraud is presented.

The complaint in this case makes no allegations of fraud. There is no suggestion in it that the common council acted fraudulently, corruptly or dishonestly, and there is no fact averred which could be the basis of any such conclusion. The plaintiff states the reasons which induced him to vote against the measure, and it may be that it would have been well if they had convinced a majority of his associates. But they did not; and we cannot support his judgment by judicial action, in the absence of fraud; unless the proposed contract is contrary to law.

It is plain enough, upon merely reading the complaint, that the only ground upon which the plaintiff believed the court should or could interfere, was that the proposed contract was illegal and void by reason of the provision contained in the act of April 20th, 1866.

The plaintiff did not claim that there was any other statute which prevented the making of the contract.

The provision of the act of April 20th, 1866, which restricts the power of the corporation as claimed by the plaintiff, is, I think, unconstitutional. That statute, which was the tax levy for the year 1866, is a private or local bill within the meaning of the constitution, and the section relied upon relates to a subject not expressed in the title of the law. I have recently had occasion to express my views upon this point in the case of *The Transcript*

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Association v. The Mayor &c.; and those views are sustained by the opinion of Justice Sutherland in *Pullman v. The Mayor &c.*, and Justice Monell in *Bretz v. The Mayor &c.*, and Justice McCunn in *Smith v. The Mayor &c.* (See also *The People v. Hills*, 35 N. Y. Rep. 449; *The Sun Mutual Insurance Company v. The Mayor &c.*, 4 Seld. 253.) We have not been referred to any other enactments restricting the power of the corporation upon this matter, and I know of none myself, except a statute respecting all cities and villages, passed in 1853, (*Session Laws of 1853*, p. 1135;) but which obviously does not affect the present case, and the 32d section of the revised ordinances of the city, relating to contracts for supplies and work for the corporation, (*see Hoffman's Laws of New York*, vol. 1, p. 148,) which forbids the departments of the city, and those having charge of expenditures, making contracts or incurring expenditures, authorized by the common council, to an amount exceeding the several appropriations made; unless an appropriation sufficient to cover such excess shall have been made by the common council. But this was only a by-law of the city, revocable at its pleasure, and the resolution directing the making of the contract in question expressly repealed any resolution or ordinance inconsistent with it.

The complaint presenting no case justifying the interference of the court on the ground of fraud; and there being no valid act preventing the making of the contract, it follows that the injunction should have been dissolved, and therefore that the order below was erroneous and should be reversed.

INGRAHAM, J., (dissenting.) I am not satisfied to hold that the 9th section of the tax law of 1866, page 2070, is unconstitutional. It has been held that the tax law is a private or local bill. As such it cannot contain any provisions not connected with the subject matter of the

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statute. That act was passed to provide means for carrying on the government of the city for the year, and the legislature limited the use to which the money should be applied by this section.

The first part of the section prohibits the use of the moneys to be raised for any other purpose than that to which they are appropriated. This has been for many years incorporated in the tax bills, and has never, that I know of, been objected to as unconstitutional. The residue of the section prohibits the making of any contract, or incurring any liability for any purpose, which would exceed the sum appropriated.

I think this provision may fairly be considered as a part of the necessary regulations as to the application of the moneys to be raised by tax. It is the same subject, directing the application of the money and preventing its use for any other purpose.

The order should be affirmed.

Order reversed.

[NEW YORK GENERAL TERM, April 6, 1869. *Geo. G. Barnard, Ingraham and Cardozo, Justices.*]

CORNELIUS D. HICKS vs. ROBERT C. DORN, Superintendent of Canal Repairs.

It is the duty of a superintendent of repairs on the Erie canal to remove obstructions which hinder or prevent navigation thereon.

And a superintendent having in good faith determined in regard to the necessity and propriety of removing a boat belonging to an individual, as an obstruction in the canal, he can only be held responsible to the owner upon the ground that he was chargeable with negligence, or improper conduct, in executing the work.

The rights of an individual in regard to his property should be respected; and even public officers are not at liberty to disregard such rights, unless there is a clear and urgent necessity therefor, to subserve an important and pressing public necessity. *Per INGALLS, J.*

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To justify a material injury to, or destruction of, the property of an individual, there must exist a pressing necessity, both in regard to the work to be performed, and the manner of executing it.

If a superintendent of canal repairs can repair a breach in the bank of the canal occasioned by a flood, by a resort to *ordinary* means, and thereby continue navigation without material interruption, or serious detriment to the public welfare, it is his duty to do so, instead of adopting the *extraordinary* measure of cutting a piece off a canal boat owned by an individual, in order to close the gates of a lock.

And where the proof showed that there were several other methods by which the obstruction caused by a canal boat grounding in the gates of a lock could have been removed, and the difficulty obviated; it was *held* that the superintendent of repairs was not justified, on the ground of "an overruling necessity," in cutting the boat in two and removing a portion thereof, thereby subjecting the owner to a loss of his property.

Held, also, that in what he did, after he determined the necessity of removing the obstruction, the superintendent must be deemed to have acted ministerially, and was therefore bound to exercise reasonable care, prudence and discretion in performing the work.

THIS is an appeal by the defendant from a judgment rendered in favor of the plaintiff, on the report of a referee, for \$2131.95. On the 19th of May, 1865, the defendant was superintendent of canal repairs, in charge of section two, of the Erie canal, including the portions thereof hereafter mentioned, under instructions from the canal commissioners to act promptly whenever a break occurred, and restore the canal to a navigable condition as speedily as practicable, at all hazards. At Visscher's Ferry the canal runs nearly east and west. On the northerly side of the canal was a basin, forming part of the canal itself, covering about half an acre. At the northerly point of the basin were two lock-gates, belonging to the State, separating the basin of the canal from a dry dock, covering about a quarter of an acre, the private property of one Alexander Sherman, into which boats were taken from the canal for repairs. These lock-gates opened southerly into the canal. On the easterly side of Sherman's dry dock he had a waste-weir for letting off surplus water. A short distance west of the dry dock was a culvert, under

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the canal, the property of the State, through which, from the north, a creek, called Stony creek, ran into the Mohawk river, southerly of the canal. The lock-gates owned by the State were used as a waste-weir to let off the water from the canal, which passed into the dry dock, and out of that through the gates thereof belonging to its owner, into a ravine, through which it ran into Stony creek, above the culvert. The creek was of considerable size, and above the culvert fell rapidly. The State kept no one in charge of the lock-gates, but they were opened by Sherman and those in his employ, to let boats from the basin into the dry dock, they immediately thereafter closing them again. On the 18th of May there was a severe spring rain, which raised the water in the river, creek and canal, creating a freshet, filling the canal so that the water ran over its banks. This was the condition of the river, the creek and the canal, on the 19th of May. Two or three days previous to the 19th, the plaintiff's canal boat, the "G. W. Ganung," had been thus run from the canal into this dry dock for repairs. On the 19th of May the canal was in a navigable condition the whole length thereof, and a large number of boats were navigating it. On that day, when the canal, the creek and the river were in such a swollen condition, the canal lock-gates were opened by Sherman's men in charge of the dry dock, and the captain and crew of the plaintiff's boat commenced running her, stern foremost, into the canal. When she was nearly half way through the gates the waste-weir and gates of Sherman's dry dock suddenly gave way, creating a large breach in the bank thereof, in consequence of which the water run rapidly out of the dry dock, and of that—a three mile level of the canal. This left the boat between the open gates of the canal resting upon the miter sill. She was about 95 feet long; about 45 feet lay in the basin of the canal and the remainder in the dry dock. The lock-gates of the canal could not be closed and navigation thus resumed until the

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boat was removed. The defendant was notified of the break, and arrived on the ground about nine o'clock in the morning. He examined and deliberated upon the situation, and upon the several modes of restoring the navigation of the canal. Four methods were possible: 1. To dam up the culvert under the canal, so as to raise the water above it high enough to set it back up the ravine into the dry dock and level of the canal, deep enough to float the boat. This would have been only an experiment, and, if successful, would have been fraught with danger to the canal. 2. By repairing the banks of Sherman's dry dock, which might have been done in two days, so as to have permitted sufficient water to have been let into the canal and dry dock to float the boat out of the gates, so they could be closed, and navigation resumed. 3. By building a coffer-dam in the basin of the canal, around the stern of the boat, which could have been done in two or three days, at a cost of \$900, and \$250 to \$350 for removal. 4. By cutting out of the plaintiff's boat a piece thereof of sufficient length to enable him to close the gates between the canal and the dry dock, and let the water into the level, which could be done in about twelve hours. This involved the destruction of property, the value of which did not much exceed the expense of restoring navigation in either of the other ways. The defendant, in good faith, exercised his judgment and discretion in the premises, and in good faith determined that the best method of restoring navigation was to cut out of the plaintiff's boat a piece large enough to enable him to close the gates of the lock. He ordered it done, and it was done, without any want of care in the act of severing the boat; the pieces cut out being just long enough to allow the gates to be closed. The injury done to the boat was no greater than the act necessarily involved. Every day's delay in restoring navigation caused great damage to the State and to persons navigating the canal. The plaintiff's boat grounded in the gates of the lock,

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without any fault or negligence on the part of the plaintiff or his servants or agents; and he was not notified to remove the boat, and no time or opportunity was given him to do so. No evidence was given on the trial that at or prior to the time the defendant commenced cutting up the boat the plaintiff, or his servants or agents, had commenced removing it from between the lock-gates, or had taken any steps to do so, or that when the defendant commenced removing it they designed to or would do so. The defendant, at the close of the plaintiff's testimony, moved for a nonsuit, and again at the close of the evidence. The motions were denied, the defendant each time excepting. The referee assessed the plaintiff's damages at \$1500, and interest from the time of cutting up the boat. As a conclusion of law he held the defendant liable, to which he excepted, and on the entry of judgment appealed therefrom to this court.

N. C. Moak, for the appellant.

Isaac Lawson, for the respondent.

By the Court, INGALLS, J. It was the duty of the defendant, as superintendent of repairs on the Erie canal, to remove obstructions which hindered or prevented navigation thereon. (*Adsit v. Brady*, 4 Hill, 630. *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. Rep. 648.) It was not only made his duty by law, but he was expressly instructed by the canal commissioners to discharge that duty. The referee finds that the defendant acted in good faith in all that he did, and the injury to the plaintiff's property was no greater than the act necessarily involved. The defendant properly determined in regard to the necessity and propriety of removing the defendant's boat as an obstruction, and can only be held responsible upon the ground that he was chargeable with negligence, or improper con-

duct in executing the work. The rights of an individual in regard to his property should be respected; and even public officers are not at liberty to disregard such rights, unless there is a clear and urgent necessity therefor, to subserve an important and pressing public necessity. Mere convenience on the part of the public in regard to the mode to be adopted in accomplishing a result, would not, in my judgment, create such a necessity as would justify a material injury to or destruction of the property of an individual. Certainly not, if any other legitimate mode could be resorted to and produce the same result without serious injury to public interests. In other words, there must exist a pressing necessity, both in regard to the work to be performed and the manner in which it should be executed, to justify such an act. No other rule would be safe or furnish adequate protection to the citizen against the encroachment of superior power. It is not pretended that the plaintiff was guilty of negligence or improper conduct in the management of his boat. The question therefore presented for the determination of the referee was, whether, in view of the circumstances, it was necessary for the defendant to destroy the plaintiff's boat, in order to remove it, as an obstruction to navigation. In determining this question, it became necessary for him to ascertain from the evidence, whether the defendant could not reasonably have adopted some other method to accomplish the same result, and thereby avoided doing the plaintiff such serious injury. If the defendant could have repaired the breach occasioned by the water, by a resort to *ordinary means*, and thereby continued navigation without material interruption or serious detriment to the public welfare, it certainly was his duty to have done so, instead of adopting this *extraordinary* measure, so fraught with injury to the plaintiff. The evidence discloses, and the referee has found, that there were several methods by which the obstruction could have been removed and the difficulty obvi-

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ated, which were brought to the attention of the defendant before he entered upon the work. One was by constructing a coffer-dam in the basin of the canal, around the stern of the boat, and raising the water so as to float the boat, which could have been accomplished in two or three days, at an expense of \$900, and \$250 or \$300 to remove the dam. Another was to repair the banks of the dry dock, which could have been done in two days. Another, by damming up the culvert, and thereby raising the water so as to float the boat and close the gates. It appears that from eight to ten hours were expended in cutting the boat, and about twelve hours to restore navigation, and the plaintiff was damaged to the extent of \$1500. There is considerable evidence bearing upon the feasibility of the several methods. In my opinion a fair question of fact was presented for the determination of the referee, whether, in view of all the circumstances, the defendant exercised reasonable prudence in executing the work in question; whether he was justifiable in pursuing an extraordinary rather than an ordinary method in removing the obstruction. The evidence shows pretty clearly that, with possibly some additional delay and expense, the work could have been accomplished, and the plaintiff's property preserved. Is it just or reasonable to conclude, in this case, that there existed, what Senator Sherman, in his opinion in *Russell v. The Mayor &c. of New York*, (2 Denio, 475,) denominated "an overruling necessity" which justified the sacrifice of the plaintiff's property? I am of opinion that, at least, the evidence does not so far preponderate in that direction as to call upon this court to reverse the decision of the referee in that particular. In what the defendant did after he determined the necessity of removing the obstruction, I think he must be deemed to have acted ministerially, and was therefore bound to exercise reasonable care, prudence and discretion in performing the work. (*Barton v. The City of Syracuse*, 36 N. Y. Rep. 54. *Robin-*

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son v. Chamberlin, 34 *id.* 389. *Rochester W. Lead Co. v. The City of Rochester*, 3 *id.* 463.)

Due regard for the interests of the public, by public officers, is commendable, and they are entitled to reasonable protection when acting within the scope of their authority, and in good faith. But the rights of the citizen should not be disregarded by improperly imposing upon him a burden which should be borne by the State. The plaintiff was free from blame, and the expense of the work in question was properly chargeable to the State, and under the facts of this case the defendant was not justified in destroying the plaintiff's property, and thereby subjecting him to the loss, instead of by some other means removing the obstructions at the expense of the State. Whether the State will allow its servant, who has acted in good faith, and but too strictly in its favor, for the interest or even the right of the plaintiff, to suffer, is not for us to speculate. The judgment should be affirmed, with costs.

Decision accordingly.

[ALBANY GENERAL TERM, May 3, 1869. *Miller, Ingalls and Peckham, Justices.*]

 GARVEY vs. JARVIS and others.

The holder of a judgment cannot legally bind himself, by any species of executory agreement, to accept a less sum than is actually due thereon and discharge the judgment; *it seems*.

A judgment, or any matter of record, like a specialty, cannot be discharged, even by what would be considered a good accord and satisfaction in other cases.

Although, under section 122 of the Code of Procedure, the court may determine any controversy between the parties before it, yet where neither of the defendants, in his answer, demands of the court any relief, as against the others, but each merely asks that the complaint be dismissed as to him, it is too late to demand any more, on appeal.

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THE plaintiff in this action alleged in his complaint that on or about the first day of November, 1861, James F. Malcolm, one of the defendants, recovered a judgment in the county of Kings against this plaintiff and one Peter Ziglio, for the sum of \$2202.90, and a transcript thereof was on the first day of November, 1861, duly filed in the city and county of New York. That during the month of January, 1867, the plaintiff being owner of certain houses in the city of New York which were subject to certain mortgages and taxes that were unpaid, and upon which the said judgment was a lien after said mortgages and taxes, applied to the defendant Malcolm to release the property from the lien of said judgment, which he refused, but offered, if the plaintiff would pay him the sum of five hundred dollars in cash, that he would release him wholly from the said judgment, and satisfy the same, as against him. Whereupon John Garvey, the brother of the plaintiff, offered, in behalf of the plaintiff, to pay the same with a certain mortgage for that amount, which said Malcolm declined to accept, but renewed and left open his said offer to accept the sum of five hundred dollars as aforesaid. That the defendant Tallman is an attorney of this court, and was employed by the plaintiff as his counsel to assist him to obtain the release or settlement of said judgment, and was fully acquainted with the said facts, and well knowing that the plaintiff was desirous to pay the said sum of five hundred dollars and to obtain the release of said judgment from Malcolm, and well knowing from the plaintiff the condition of his affairs, and how the said judgment could be collected from the plaintiff, who would be forced to pay the same, and intending to wrong and defraud him and deprive him of the benefit to be derived from the acceptance of said offer of Malcolm, which the plaintiff was endeavoring to comply with and fulfill, confederated and conspired with the defendant Philip S. Roach, and concocted with him that said Roach should go

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to Malcolm, and representing to him that he represented the plaintiff herein, pay the said five hundred dollars, and procure an assignment of the judgment to Roach for the benefit of said Roach and Tallman. Whereupon Roach did go to Malcolm, and representing that he came in behalf of the plaintiff, and said Malcolm believing the same, offered to pay him and did pay him the sum of five hundred dollars, which Malcolm accepted as and from the plaintiff, and then and there, at the request of said Roach, who represented that said plaintiff desired the same instead of satisfying the said judgment as against the plaintiff, there assigned the said judgment as against this plaintiff to the defendant Roach, as trustee for the plaintiff. That thereupon said Roach instituted supplementary proceedings on said judgment against the plaintiff, who was ignorant of the said transfer, and, assisted by the defendant Tallman, did obtain and procure from the plaintiff \$1200 on account of said judgment and by means of said proceedings, the plaintiff being kept in ignorance of said facts, and that said judgment had been so transferred. The said Tallman being in fact and truth during all of said time in collusion with Roach in reference to said supplementary proceedings. That on the 11th day of June, 1867, Roach assigned and transferred the said judgment as to the plaintiff to the defendant Nathaniel Jarvis, in trust, to collect the remainder thereof from the plaintiff and to divide the same between Roach and Malcolm in the following manner, namely, to said Roach \$750, and said Malcolm \$943; and the plaintiff alleged that the defendant Roach had been previously fully repaid and reimbursed the said \$500 by the plaintiff. Therefore the plaintiff demanded judgment against the defendants, and that it might be adjudged and decreed that said judgment, so far as it affects the plaintiff, was assigned and transferred by the defendant Malcolm to said Roach, as the agent and trustee of the plaintiff, and was so received and taken by him; and that said

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assignment was intended to be and was a valid executed discharge of the plaintiff therefrom, and that said defendant Jarvis holds the same as the agent of and in trust for the plaintiff, and might be adjudged and decreed to assign the same to the plaintiff; and that the defendants might be forever enjoined and restrained from demanding or recovering the same, or any part thereof, from the plaintiff, or that the same might be adjudged discharged as against the plaintiff, and for general relief.

The defendants, by their answers, denied the material allegations of the complaint; and each defendant, without asking for any relief against his co-defendant, prayed that the complaint might be dismissed, as to him, with costs.

The action was tried before a justice of this court without a jury. The following facts were found by the justice: 1st. That about the first day of November, 1861, the defendant Malcolm recovered a judgment against the plaintiff and one Peter Ziglio for \$2202.90, which he still owned in January, 1867, there having been a sum of two hundred dollars paid upon it by Garvey in October, 1866, the balance remaining unpaid.

2d. That in January, 1867, Malcolm, by word, promised Garvey that he would satisfy and discharge said judgment against him for \$500, but Garvey did not then accept the offer.

3d. That Malcolm, while still willing to discharge said judgment for that sum, was, upon the false representation of Roach that he came from and was a friend of Garvey, induced to and did assign the judgment to Roach upon the payment of \$500.

4th. Upon obtaining the assignment, Roach immediately took supplementary proceedings against Garvey on the judgment, and obtained \$1200 from Garvey by means thereof.

5th. Upon discovering the fraud of Roach, Malcolm brought a suit to set aside the sale and assignment to him,

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which was compromised on the 11th of June, 1867, by an assignment of the judgment to Jarvis to collect it, and to pay to Malcolm \$943 and to Roach \$750, the balance due thereon, and said Jarvis still holds the judgment.

6th. Malcolm makes no other claim upon said judgment than for the \$943 and interest, over and above the \$500 paid him by Roach.

7th. That said Garvey never paid the \$500 to Malcolm, nor did Garvey ever accept of said offer, nor did Garvey ever tender to Roach, the assignee of said judgment, the \$500.

As a conclusion of law from these facts, the justice found that Malcolm was not legally bound to accept the \$500 in satisfaction of said judgment. That Garvey had no legal or equitable right to have said judgment satisfied for a less sum than was actually due thereon, which he could enforce. That the fraud perpetrated upon Malcolm by Roach did not enure to the benefit of Garvey. That no fraud was perpetrated upon Garvey, because he had lost nothing to which he was either legally or equitably entitled.

Judgment was ordered for the defendants Malcolm and Jarvis, with taxable costs only, and judgment for the defendant Roach, without costs.

The plaintiff appealed from such judgment.

Geo. C. Genet, for the appellant.

J. F. Malcolm, in person and for respondent Jarvis.

S. F. Higgins, for respondent Roach.

By the Court, CLERKE, P. J. The finding of law, that Garvey had no legal or equitable right to have Malcolm's judgment against him satisfied for a less sum than was actually due thereon, is clearly deducible from the findings of fact. Malcolm had not legally bound himself to Garvey to take less; indeed I doubt whether this could

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be done, by any species of executory agreement. A judgment, or any matter of record, like a specialty, cannot be discharged, even by what would be considered a good accord and satisfaction in other cases. Garvey, therefore, had no other interest, which could be enforced against any of the defendants.

Malcolm asks this general term to award him relief against Roach, and to decree that he is entitled to any money which was to be paid to Roach, under the compromise of the 11th of June, 1867, less the \$500 which Roach had paid to Malcolm. Undoubtedly, under section 122 of the Code of Procedure, the court may determine any controversy between the parties before it; but neither of the defendants demanded of the court any relief, as between them. Each defendant merely asked that the complaint should be dismissed as against him; and it was so dismissed. It is too late to demand any more on this appeal.

The judgment should be affirmed, with costs.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clarke, Cardoso and Geo. G. Barnard*, Justices.]

COLLINS *vs.* CLARK and others.

Where a referee, in his report, entirely ignores the principal, if not the only issue in the case, and no judgment can be properly rendered until such issue is decided, the judgment entered upon his report will be reversed, and a new trial ordered.

Thus where, in an action to compel the defendants to account for and pay to the plaintiff certain profits realized by them as stock brokers, on the purchase and sale of stocks for him, together with money deposited by the plaintiff with them, by way of security or margin, and for a loss occasioned by their neglect and refusal to sell when ordered to do so, the only disputed question, and the principal issue in the case was, whether the plaintiff di-

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rected the defendants to sell, on a particular day, at a specified price; and the referee, in his report, took no notice of that issue; *Held*, that as no judgment could be rendered until such issue was decided, it was a proper case for a new trial.

THE plaintiff, by his complaint, demanded that the defendants should *account* to him for certain moneys alleged to have been deposited as margin on stock speculations, and for the profits and proceeds of certain stocks bought and sold on his account, and particularly for the value of 600 shares of Hudson River Railroad stock, bought on the 9th April, 1864, after deducting the costs, commissions and interest thereon. The complaint alleged, and it was established, that certain purchases and sales of stock were made, which are recited in the complaint, and which, excluding the purchase or sale of the 600 shares of Hudson, resulted, on the 9th April, 1864, in a profit of \$3452.43.

The defendants, by their answer, admitted that they did, at the request and on the account of the plaintiff, purchase the several parcels of stock in the complaint alleged, and that they sold the several parcels of Pittsburgh, Fort Wayne and Chicago stock, Michigan Southern and Northern Indiana Railroad stock, Illinois Central Railroad stock, in the complaint mentioned, at the request and for the account of the plaintiff, and that such purchases and sales were made at the prices in the complaint alleged; but denied that they made the agreement in the complaint mentioned, or that any of the said purchases and sales were made under or in pursuance of said alleged agreement. They admitted and alleged that on the 9th April, 1864, they held six hundred shares of Hudson River Railroad stock, which they had purchased for account of the plaintiff; but denied that on that day or at any other time the plaintiff directed them to sell the same whenever they could obtain the prices named in the complaint; or that the plaintiff gave the order to sell in the complaint

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mentioned; or that they agreed to sell the same according to such request; or that they neglected to comply with any request or directions given by the plaintiff in regard thereto; or converted the same, or sold the same without notice to him, or without his knowledge, as alleged in the complaint; or that on that day the market value of the stock was as alleged, or that the prices at which the plaintiff alleges he directed the same to be sold on the 9th April, 1864, could have been obtained by them therefor; or that the omission to sell the same at said prices was owing to any negligence or default of these defendants. The defendants alleged, that in the transaction in the complaint mentioned, they purchased the said stocks in their own name and paid therefor, and were entitled to charge interest at the rate of seven per cent per annum on the several sums so advanced and expended therefor, commission at the rate of one-eighth of one per cent on the par value of each share of stock sold or purchased, for making the purchase, and the same commission for making the sale, and were entitled to hold the stock so purchased as security for the said moneys; and were also entitled to hold any and all balances of money in their hands, whether deposited by the plaintiff or arising out of the sales or profits on the sales of other parcels of stock and standing to his credit with the defendants, and any and all stocks held by the defendants for the plaintiff as an additional security against any loss which the defendants might incur or be subjected to by reason of any depreciation in the market value of any of the stocks so purchased, and against any insufficiency of the values of any or all the stocks so purchased to pay the defendants the amounts advanced and expended by them, interest and commission, and against any deficiencies which might exist after applying all or any of the said stocks to the repayment of said moneys, interest and commissions; and were entitled to hold any of the said stocks so purchased,

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and the proceeds of the sale of any or all of the stocks as security for the repayment of the moneys advanced or expended by them for the purchase of any or all of said stocks, interest and commission, at the rate aforesaid; and that they were so entitled by a custom and usage to that effect, established and well known, and of which the plaintiff was well aware, and that the dealings between the plaintiff and the defendants referred to in the complaint were made with respect and in reference to said custom and usage. And that said arrangement above mentioned was in conformity with such custom and usage. The defendants further alleged, that on the 9th of April, 1864, and at the time of the commencement of this action, there was due to them, the defendants, from the plaintiff, on the several transactions in the complaint mentioned, a large sum of money, after applying to the credit of the plaintiff all sums proper to be credited, arising from the sales of stock or otherwise, and charging him with the sums paid for the purchase of said stock and interest, and commissions, and as security therefor, the defendants held the six hundred shares of Hudson River stock, mentioned in the complaint, which last mentioned shares were, after the commencement of this action, sold after due notice to the plaintiff, and demand of payment and neglect to pay the said balance, and that after crediting the proceeds of said sale the plaintiff was and is indebted to the defendants in a large sum of money, for which amount the defendants demanded judgment, with interest and costs.

The referee found, as matter of fact: *First.* That on the 7th day of March, 1864, the defendants were doing business as bankers and stock brokers under the firm name of Clark, Dodge & Co.

Second. That the plaintiff, on the 7th day of March, 1864, deposited with the defendants the sum of thirty-five hundred dollars, as a margin on which to purchase and sell stocks on his account, as he might order and direct; and

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the defendants agreed to execute the plaintiff's orders for the commissions and interest which they should receive from said plaintiff in the purchase and sale of stocks.

Third. That in pursuance of said agreement, the defendants, at the times in this complaint mentioned, purchased by order of the plaintiff, and for his account, the different shares of stock at the different times mentioned in said complaint, and at the prices therein stated, and that they sold said shares of stock, viz: two hundred and fifty shares of the stock of the Pittsburgh, Fort Wayne and Chicago Railroad Company, two hundred and fifty shares of the stock of the Michigan Southern and Northern Indiana Railroad Company, one hundred shares of the said Michigan Southern and Northern Indian Railroad Company, and two hundred shares of the scrip stock of the Illinois Central Railroad Company, at the price stated in said complaint.

Fourth. That the profits to the plaintiff upon the purchase and sale of the said shares of stock, over and above the defendants' charges for commissions and interest, amounted to the sum of thirty-four hundred and fifty-two dollars and forty-three cents.

Fifth. That at the times mentioned in the complaint the defendants purchased for the account of the plaintiff, and by his direction, six hundred shares of the stock of the Hudson River Railroad Company, and on the 18th of April, 1864, at the board of brokers, in the city of New York, the defendants sold said stock without notice to the plaintiff.

And from the foregoing facts the referee found, as conclusions of law: *First.* That the plaintiff was not bound by the purchase or sale of said six hundred shares of the stock of the Hudson River Railroad Company, for the reason that the defendants sold said stock without notice to the plaintiff.

Second. That the defendants are indebted to the plaintiff

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in the sum of \$3500, being the amount deposited by the plaintiff on the 7th of March, 1864, and in the further sum of \$3452.43, the profits on the said stocks sold, with interest thereon from April 9, 1864, amounting to the sum of \$1297.79, and making altogether for principal and interest, at the date of his report, the sum of \$8250.22, besides costs. And he ordered judgment accordingly.

To which report and findings of fact the defendants took various exceptions, and judgment being entered, they appealed therefrom.

John E. Burrill, for the appellants.

E. Cooke, for the respondent.

By the Court, CLERKE, P. J. This action is brought to compel the defendants to account for and pay to the plaintiff certain profits, which they, as stock brokers, realized on behalf of the plaintiff in the purchase and sale of certain railroad stocks, together with money deposited by the plaintiff as a security against loss by them, and also for loss or damage incurred by the plaintiff in consequence of the neglect and refusal of the defendants to sell 600 shares of the Hudson River Railroad Company which, in addition to the stock first referred to, they had purchased for the plaintiff, and which he alleges, expressly, he ordered them to sell on the 9th of April, 1864.

In the answer, the defendants admit that they had purchased and sold for the plaintiff the several parcels of stocks mentioned in the complaint, in addition to the purchase of 600 shares of Hudson River Railroad stock, and they deny that on the 9th of April, 1864, or at any other time, the plaintiff directed them to sell the said 600 shares, whenever they could obtain a certain price for the stock.

This is the principal, if not the only, issue in the case. The defendants admit, in their account rendered, that the

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several parcels of stock mentioned in the complaint, exclusive of the Hudson, were purchased and sold for the plaintiff at the prices mentioned by him in the complaint. So that, it appears to me, the only disputed question was, whether the plaintiff should be credited, in the account, with the difference between the price at which the 600 shares of Hudson were purchased, and the price which they would have brought, if the defendants had sold them on the 9th of April; and, whether he should be so credited depended upon the truth or falsehood of his allegation that he directed them to sell on that day at from 159½ to 160½ per share. If he did direct them to sell on that day, and if they could then obtain that price, he was entitled to be credited, as I have already stated; if he did not direct them to sell on that day, they were not liable to be charged with the prices then obtainable, and if the stock subsequently fell, and if the defendants were compelled to sell by reason of the plaintiff's neglect to keep good his margin, according to his engagement, and if they sold on reasonable notice, they were not to suffer from the consequences.

¶ The referee entirely ignores this issue clearly elicited from the pleadings, and, as I have said, from the nature of the case, the principal, if not the only one in it. No judgment can be rendered, until this issue be decided.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, June 7, 1869. *Clarke, Sutherland and Ingraham, Justices.*]

THE REFORMED PROTESTANT DUTCH CHURCH OF WESTFIELD,
Staten Island, *vs.* SUSAN D. BROWN, executrix, &c.

54	191
122a	45
54b	191
63a	4848

In order to avoid multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But when several claims, payable at different times, arise out of the same contract or transaction, separate actions can be brought as each liability enures.

Yet, if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in that suit will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought.

The case of *Beach v. Crain*, (2 *N. Y. Rep.* 86,) distinguished from the present.

APPEAL by the plaintiff, from a judgment entered upon the report of a referee, dismissing the complaint.

This was an action commenced against the defendant, Susan D. Brown, executrix, widow, sole legatee and next of kin of David Brown, deceased, to recover three several yearly subscriptions of one hundred dollars each, due and unpaid, upon a certain instrument or agreement in writing, executed by said David Brown in his lifetime.

The action was referred to John T. Hoffman, Esq., as sole referee, who found the following facts: 1st. That the plaintiff, at the time of the commencement of this action, and for several years prior thereto, was and had been a religious incorporation, duly incorporated according to the laws of the State of New York.

2d. That David Brown, in his lifetime, with several other residents of Westfield, Staten Island, made and executed a certain instrument or agreement in writing, in the words and figures following, viz:

“We, the inhabitants of the township of Westfield, in and near the village of Bloomingview, Staten Island, feeling a desire for the regular preaching of the gospel, and the stated ordinances of the sanctuary, to be established in a more convenient neighborhood to us and to our families than any we can now enjoy, do agree hereby to unite

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our endeavors for the purpose of forming and establishing a Christian church in our midst, and that we will pay, yearly, the sums annexed to our respective names, for the purpose of supporting a minister of the gospel, for the object aforesaid.

Westfield, Staten Island, February 26th, 1849."

3d. The sum annexed, or set opposite, to the name of the said David Brown, upon the said paper, was \$100.

4th. The said David Brown, and others who were subscribers to said paper, proceeded to organize and establish a church, to wit, the plaintiffs herein, "The Reformed Protestant Dutch Church of Westfield, Staten Island," and a minister was employed to preach, and did preach, for said plaintiffs, from about the time of the date of the agreement aforesaid, down to and including the time of the commencement of this action.

5th. Under the provision of said agreement, \$100 became due and payable from said David Brown on the 26th day of February, 1850, and \$100 on the 26th day of February in each succeeding year.

6th. The said David Brown died on the 3d day of July, 1853, leaving a last will and testament, in and by which he appointed the said Susan D. Brown, defendant herein, who was his wife, the executrix of said will, and his sole legatee. She accepted said appointment as executrix, and as such rendered her final accounts to the surrogate of the county of New York, being the county in which said will was proved, and said accounts were allowed and passed; and, under the order of the surrogate, the balance remaining in her hands was retained by her, as sole legatee under said will. And the moneys which came into her hands as such executor and legatee were more than sufficient to pay all debts due and owing by the said deceased.

7th. On the 15th day of May, 1854, the plaintiff herein commenced a suit against the said defendant, claiming to recover of her, as executrix of said deceased, one year's

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subscription for minister's salary, under the agreement hereinbefore mentioned, and also certain other moneys claimed on a subscription for building a church. At that time the subscription for the three subsequent years for salary of said minister (being the same for which this action is brought) were due and payable, but no claim was made therefor in said first mentioned suit. Judgment was rendered in said first mentioned action, upon the merits thereof, in favor of said plaintiff, against the defendant, for the amount claimed, with interest, on the 16th day of November, 1857, and on the day following said judgment this action was commenced. The judgment so rendered was afterwards affirmed on appeal, and, having been affirmed, was paid by the defendant as executrix as aforesaid.

8th. The three years' subscription, for which this suit is brought, have not, nor has any part thereof, in fact, ever been paid.

The referee's conclusions of law, upon the facts aforesaid, were: 1st. That David Brown, by his subscription aforesaid, became legally bound to pay to the plaintiff, for the support of a minister, \$100 a year, not only for the first year succeeding the date of said subscription, but for the three years succeeding said first year, being the same period mentioned in the complaint herein.

2d. But, notwithstanding such obligation, the plaintiffs having, before the commencement of this action, sued the defendant for the first year's subscription only, at a time when the succeeding three years' subscriptions were due and payable, under the same contract, and recovered judgment in said suit, as before mentioned, was in law thereby barred and precluded from maintaining this action.

3d. That the defendant was entitled to judgment dismissing the plaintiff's complaint, with costs.

The following reasons were given by the referee, for his decision: "Without stating the facts in this case, or re-

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viewing the authorities, I will simply say that in my opinion the defendant must have judgment.

When the plaintiffs commenced their former suit against the defendant, in May, 1854, for moneys due under the contract, set forth in the complaint in this action, the amounts claimed in this second suit were also due and unpaid, under the same contract. The first suit was for the first *year's subscription* to the pastor's salary, and for the subscription towards the church building. At that time the second, third and fourth years' subscription for salary, under the same contract, was also due, but the plaintiffs failed to include them in that suit, and have brought this suit to recover the same.

In my opinion the judgment in the first suit is a bar to the second, upon the principle that when a party hath several demands or existing causes of action, growing out of the same contract, which may be joined or sued for in the same action, they *must be* joined; and if the demands or causes of action be split up, and a suit brought for a part only, and a subsequent second suit for the residue, the first action may be pleaded in abatement or in bar to the second action. (*See Bendernagle v. Cocks*, 19 *Wend.* 207; *Secor v. Sturgis*, 16 *N. Y. Rep.* 548.) The case of *Badger v. Titcomb*, (15 *Pick.* 409,) so strongly relied on by the plaintiff's counsel, is not an authority in this case. It will be found discussed in the opinion of Judge Cowen, in *Bendernagle v. Cocks*, (19 *Wend.* 207.)

W. M. Evarts and *John Fitch*, for the appellant. I. The agreement upon which this action was brought is an agreement to pay a certain sum yearly, and a distinct cause of action arose each year, upon failure to pay, and is a divisible contract. (*Cooke v. Whorwood*, 2 *Saund.* 337. *Beach v. Crain*, 2 *Comst.* 96.) The plaintiffs, a religious corporation, sue the defendant on a verbal contract; not under seal, but by virtue of its being between a religious cor-

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poration and a party thereto. It by law becomes a new contract every year, so long as the gospel should be preached in that church. (*First Religious Soc'y of Whites-town v. Stone*, 7 John. 112. *Dieffendorf v. Reformed Church, &c.*, 20 *id.* 12.) This action could not be sustained as between man and man. It being a verbal contract it would only bind the party one year, as it is to be performed in each year. The religious corporation being a party saves it. The plaintiff was duly incorporated. (*See Reformed Prot. Dutch Church v. Brown*, 17 How. Pr. 287, affirmed by *Court of Appeals*.) The action is upon a divisible contract, and can be sued on, on breach of any one of the stipulations; (it is the same as the annual giving of a note for the \$100,) and each of the stipulations being considered as a separate contract. (1 H. Bl. 550. *Badger v. Titcomb*, 15 Pick. 414. 2 Cush. 286. *McIntosh v. Lown*, 49 Barb. 557.) The paper upon which the plaintiffs sue is a debt, due annually, of \$100, the same as a note given yearly. It is assignable—transferable by assignment and sale—good in the hands of any *bona fide* holder, and can be sued on the same as on three several notes. The paper is the same as a paper made at the expiration of each year. It is a note; only that, and nothing more. The three annual debts in suit have never been passed upon. They were not included in the former action, and are not *res adjudicata*. If they had been included in the former complaint and passed upon, then they would have been *res adjudicata*; not without. It is not a case of splitting a single cause of action. (*Doty v. Brown*, 4 Comst. 71.) None of the cases adjudicated are like this. The case in the 16th N. Y. Rep., on which the defendant relies, is the nearest this of any, and in that case the plaintiff recovered. In that case it was a money demand on which there were ten suits pending at the same time. That was an indivisible contract, entirely different from this. The principle which the defendant applies to have control

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over this case, is not applicable to the facts as here presented. They apply to a bill of goods and such like sales of property as the 8th *Wend.* 492; only to indivisible contracts similar to the case of *Secor v. Sturgis*, (16 *N. Y. Rep.* 554.) This claim is not an entire and indivisible demand. It is a debt or demand depending upon certain acts and contingencies to be done and performed by others. It is not a sum certain at the time of making the agreement upon which the action is brought. It is only entire claims, which cannot be divided, which come within the rule of 8 *Wend.*; 15 *id.* 55, and 16 *N. Y. Rep.*, and as explained in *Risley v. Squire & Johnson*, (53 *Barb.* 280.) In *Bendernagle v. Cocks*, (19 *Wend.* 207,) the court (Cowen, J.) says: "I admit the rule does *not extend to several and distinct contracts.*" That is the case; this paper is to a religious corporation, and runs for the year; it is not under seal. Each year it by law becomes a new contract, and as between man and man it would be worthless. It is only good because it is a subscription to a religious corporation. The preaching of the gospel for the year was the consideration for the year. If the minister had ceased to render services, the annual \$100 would not be due. (7 *John.* 112. 20 *id.* 12, *supra.*) Interest accrues on each year's services. This is a divisible claim; each year divided by itself and drawing interest after it, and is such a case as is spoken of and provided for in *Secor v. Sturgis*, (16 *N. Y. Rep.* 554.) The act of procuring a preacher of the gospel created a debt each year, no matter in *what shape*, note of hand or how, and would have to be so stated in any complaint. (1 *H. Bl.* 550, *and the case cited.*) If the officers of the church had not employed a preacher, the contract would have become void. The rule of law is well settled, that an indivisible contract or demand cannot be split up and sued for in parts. Thus on a note of \$500 there cannot be five separate suits of \$100 each, (16 *John.* 121, *and all the cases cited by defendant*; 1 *Wend.*

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fec.;) so three barrels of potatoes sold at one time do not constitute three separate causes of action. Where a contract, though entire in its form, relates to several distinct and independent acts to be done at different times, (in this case to pay \$100 as the definite, annual time came round,) it is divisible in its nature, and an action of assumpsit will lie on each default. (1 *Story on Cont.* p. 9, § 25. *Badger v. Titcomb*, 15 *Pick.* 414. *Knight v. New England Worsted Co.*, 2 *Cush.* 286. *Stone v. Rogers*, 2 *Mees. & Wels.* 443. *Rudder v. Price*, 1 *H. Bl.* 550.) In *Rudder v. Price*, (*supra*,) the court says: "So the principle is well established that a contract to do different things at different times is divisible in its nature, and that an action will lie for breach of any one of the stipulations, each of the stipulations being considered as a separate contract." The payment of \$100 each year is a distinct and separate act, not depending on the act of any other year. It stands by itself, no preach no pay, and brings the case within the rule in 1 *H. Bl.* 550; 15 *Pick.* 409. In the case of *Risley v. Squire & Johnson*, (53 *Barb.* 280,) a case similar to this, the court held that a second suit, as between the same parties, for a part of a quantity of articles which might have been included in the first suit, was not a splitting up a demand or cause of action, &c., affirming the doctrine as laid down in 1 *H. Bl.* 550, that it is not a case of two suits on the same cause of action; and is decisive as to this case, settling the principle contended for; and *McIntosh v. Lown* (49 *Barb.* 557) is precisely in point. "There is no case or *dictum* which requires the party to join in one suit several and distinct causes of action." (*Phillips v. Berick*, 16 *John.* 140.) The case of *Colvin v. Corwin* (15 *Wend.* 557) is overruled by *Secor v. Sturgis*, (16 *N. Y. Rep.* 557.) The case of *Bendernagle v. Cocks* (19 *Wend.* 207) is supported mainly by *Colvin v. Corwin*. The *dicta* of Judge Strong, in *Secor v. Sturgis*, that the former judg-

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ment is a bar in a case like the present, was not necessary to the decision of that case.

II. An agreement, like this, to pay distinct sums of money at different times, is to be distinguished from a case of successive breaches of covenants in a lease under seal. This is equivalent to several distinct promises, one for each yearly amount. The promises are distinct and divisible. (*Badger v. Titcomb*, 15 *Pick.* 413; *approved in McIntosh v. Lown*, 49 *Barb.* 557.)

III. In this case the action was commenced November 17, 1857. Judgment in the former action was entered June 2, 1859. The two actions were pending at the same time. The defendant might have moved to consolidate. It is inequitable that the defendant, having failed to avail himself of this means of relief, should now be allowed, upon a mere technical ground, to defeat an admitted claim. By not moving to consolidate, he may be deemed to have consented that the cause of action be severed. This rule is for the benefit of the debtor, and he may waive it. (*Mills v. Garrison*, 3 *Keyes*, 40.)

IV. The answer in this case does not set up an identity of the cause of action with that in the former action, but a different cause of action.

Alexander & Green, for the respondents. The only questions involved in this appeal, are whether the plaintiffs should have included the claim for which the present suit is brought, in the former suit, and whether, having failed to do so, they are barred from maintaining their action.

I. The contract, so far as concerns the installments due when the first suit was commenced, was indivisible. They were demands already due by the same contract, and made one entire cause of action. (*Secor v. Sturgis*, 16 *N. Y. Rep.* 558.)

II. The several demands sued upon grew out of the same contract, and had accrued at the time of bringing

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the first suit; they could have been sued for in that action, and not having been joined with the demand for the first year's subscription in that action, the judgment in it is a bar to this action. (*Secor v. Sturgis*, 16 *N. Y. Rep.* 554. *Hopf v. Myers*, 42 *Barb.* 272. *Cocks v. Bendernagle*, 19 *Wend.* 207. *Miller v. Covert*, 1 *id.* 487. *Bancroft v. Winspear*, 44 *Barb.* 209.)

By the Court, CLERKE, P. J. In order to avoid multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But when several claims payable at different times arise out of the same contract or transaction, separate actions can be brought as each liability enures. Still, however, if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in the one first brought will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought. That is precisely the state of things in the case before us; and the authority to which the counsel of the appellant refers is not applicable to it. In that case (*Beach v. Crain*, 2 *N. Y. Rep.* 86) only one breach of the covenant had been committed, when the first action was commenced. The first was commenced on the 29th of September, 1846, for not keeping a gate in repair according to covenant, for damages that had accrued previous to that time. The second action was brought to recover damages that had accrued from the 19th October to the 30th of November, 1846, for not keeping the same gate in repair; and it was held that the former action was no bar to the second. But, if an action was commenced after the 30th of November, 1846, for the damages that had accrued during the first period, and, afterwards, a second action was commenced, for damages that had accrued during the second period, the first

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would be a bar to the second. And here, the first action brought by the plaintiff, against the defendant, was properly held to be a bar to the second, as all the installments included in both actions were due when the first was brought.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Cardoso and Geo. F. Bernard*, Justices.]

FERRAN & LOWNDES vs. HOSFORD & GOODRICH.

When the proceeding is against a vessel by name, whatever may be the nature of the claim, it is a proceeding in the nature and with all the incidents of a suit in admiralty, and all such proceedings are exclusively within the jurisdiction of the district courts of the United States.

Hence a statute passed by a state legislature, conferring the right to a lien on a vessel, and to proceed against her by name, whatever may be the nature of the claim, is unconstitutional and void.

To determine whether the debt is within the sphere of maritime jurisdiction, it is not necessary to ascertain for what purpose, or for whose use, it was contracted. If the proceeding is *in rem*, and against the vessel by name, this is exclusive, and *per se* shows that it is one of maritime jurisdiction, and exclusively within the jurisdiction of the district courts of the United States.

THE defendants appealed, separately, from a judgment ordered at a special term, on a trial before the court, without a jury.

The plaintiffs furnished supplies to the steamship *Kalorama*, at New York, in February, 1867, and claimed a lien therefor under the act of the legislature providing for collection of demands against ships and vessels, passed April 24th, 1862. (*Laws of 1862, ch. 482.*) The vessel was attached, and the defendants gave the ordinary bond providing for the payment of the amount if established to be a lien. The action was brought upon this bond. The following facts were found by the justice before whom the action was tried:

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First. That the plaintiffs were copartners, as alleged in the complaint, under the firm name of Ferran & Lowndes. *Second.* That from the 15th day of February, 1867, to the 30th day of April, 1867, one William S. Johnson was master and captain of the steamship Kalorama, then being in the port of New York; and that, during the time aforesaid, said Captain Johnson, then having charge and command of said vessel, purchased for the use of said vessel, from the plaintiffs, at their stand or place of business in Washington market, in said city of New York, goods, wares and merchandise, for said steamer, amounting in the aggregate to the sum of nine hundred and seventy-six dollars and forty-one cents, (\$976.41,) and that the same were necessary and proper for the use of said vessel, and said master was duly authorized to make such purchase for the use of said vessel. That said vessel was laid up at the dock in said city of New York during all the time aforesaid, and was not engaged in navigation during any portion of the time aforesaid; and that said Johnson, in behalf of the owners, promised to pay the plaintiffs the sum of nine hundred and seventy-six dollars and forty-one cents (\$976.41) for the same. *Third.* That no part of the plaintiffs' demand has been paid, but the sum of nine hundred and seventy-six dollars and forty-one cents, (\$976.41,) with interest thereon from the 1st day of May, 1867, is justly due and owing to said plaintiffs, as alleged in the plaintiffs' complaint. *Fourth.* That on the 30th day of April, 1867, the plaintiffs, pursuant to the statute in such case made and provided, duly filed with the clerk of the city and county of New York, a specification of their demand and lien upon said vessel, and thereby perfected a valid lien upon or against said steamer Kalorama, for the amount of the said demand. *Fifth.* That on the first day of May, 1867, the plaintiffs having such lien as aforesaid, applied for and obtained a warrant to enforce said lien, commanding the sheriff of the city and county of New

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York to attach said vessel, to answer the plaintiffs' said claim, if established to be a lien upon said vessel, and that the sheriff, under and in pursuance of said warrant, duly attached and seized said vessel. *Sixth.* That afterwards, and on the 8th day of May, 1867, the defendants applied for and obtained an order of this court directing the discharge of said vessel, upon the execution of the usual bond in such case provided, and that thereupon, and in pursuance of said order, and for the purpose alleged in the complaint, the defendants duly executed and delivered the bond mentioned and set forth in the plaintiffs' complaint, and thereby did obtain a discharge of said vessel. *Seventh.* The judge found that by a stipulation signed by the plaintiffs' attorney, it was admitted that the steamer Kalorama was a vessel, and was registered in Baltimore, Maryland, and Georgetown, District of Columbia, and that her owner resided in Washington, District of Columbia, at the time the supplies named in the complaint were furnished, and that he was totally insolvent. *Eighth.* The judge found, as a matter of law, that the plaintiffs' aforesaid claim was a subsisting lien upon said vessel at the time said bond was executed and delivered as aforesaid, and for the costs of the proceedings thereupon had up to that time. *Ninth.* That the defendants were jointly liable to the plaintiffs upon their aforesaid bond, according to the terms and conditions thereof, to the extent of the plaintiffs' aforesaid lien, to wit, in the sum of nine hundred and seventy-six dollars and forty-one cents, (\$976.41,) and interest thereon from the first day of May, 1867, besides costs and disbursements to be taxed, including costs on said warrant of attachment, and proceedings thereupon had.

For which amount the judge ordered and directed judgment for the plaintiffs.

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Wm. W. Goodrich, and Davis & Edsall, for the appellants.

I. This statute has been adjudged unconstitutional, so far as it attempts to give a lien on a foreign vessel. (*The Moses Taylor*, 4 Wall. 411. *Trevor v. Hine*, *Id.* 555. *In Re Steamboat Josephine*, 39 N. Y. Rep. 19.)

II. The Kalorama being owned and registered in another state, was a foreign vessel, so as to give a lien in admiralty. (1 *Parsons' Maritime Law*, 492, and notes. *Prat v. Read*, 19 *Howard's U. S.* 359. *The Nestor*, 1 *Sumner*, 73. *The Stephen Allen*, *Blatch. & H.* 175.)

III. To enforce the law for supplies furnished to such a foreign vessel, the admiralty courts have exclusive jurisdiction. (*Cases last cited*; also 12 *Admiralty Rule*, U. S. *Supreme Court*, in 21 *Howard's Reports*.) (1.) The constitution of the United States (sec. 2, art. 3) extends the judicial power of the United States to all causes of admiralty and maritime jurisdiction. (2.) Section 9 of the judiciary act of 1789, gives to the district court of the United States, "exclusively of the state courts," cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors a common law remedy when the common law is competent to give it." The act of 1862 is, therefore, unconstitutional and void, so far as relates to the present action. This point is expressly decided in the cases cited under the first point.

IV. It makes no difference that the vessel was not engaged in navigation during the time of the supplies. The only question is, whether she was a foreign vessel, and whether if owned by a non-resident the admiralty had jurisdiction. If she was a foreign vessel, especially if the owner was non-resident and insolvent, then there was jurisdiction in the admiralty courts to enforce the lien, and the act becomes unconstitutional to that extent. This jurisdiction has never been questioned or doubted.

The law on this subject has been well stated by United States judges, Nelson, Shipman and Benedict, in the re-

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cent cases of the *Neversink*, the *James Guy* and the *Washington Irving*.

V. The plaintiffs have failed to establish that their claim is a lien upon the vessel, pursuant to the conditions of the bond. The burden of proof on this point was with them. To prove this, they were bound to show (what they could not have shown) that the United States courts have no jurisdiction to enforce the claim in admiralty, because, even if the statute had not been declared unconstitutional, unless they show that fact, there is no consideration for the bond, and it is *void*.

It follows, from the foregoing points, that there is no statutory authority for the bond, and that it is without consideration or color of law and void, and the judgment should be reversed.

E. A. Doolittle, for the respondent. I. The condition of the bond is to pay "any and all claims and demands which shall be established to be due the plaintiffs, and to have been subsisting liens upon the vessel pursuant to the act of 1862." That act first creates a lien. The language of the act is, "such debt shall be a lien upon such vessel, &c., and shall be preferred to all other liens thereon except mariners' wages." The authority of the legislature of New York to create liens upon property within its jurisdiction, for indebtedness growing out of contracts made and executed within its jurisdiction, cannot seriously be questioned; such right has been exercised and acknowledged from time immemorial. For instance: landlord's lien; the mechanic's lien; the lien created by filing *lis pendens*, &c. &c.

The United States courts have repeatedly recognized such rights, and have enforced them in admiralty. *Parsons* says: "It is obvious that our state legislature have no power to confer additional jurisdiction upon the United States courts. But the legislature may give a lien where

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none before existed. And if this is in respect to a subject *maritime in its nature*, admiralty process should lie to enforce it. (2 *Pars. Mar. Law*, 640, 641.) The grant to the United States in the constitution, of all admiralty and marine jurisdiction, does not extend to a cession of the waters in which these cases may arise, or of general jurisdiction over the same. The general jurisdiction over the place, subject to this grant, adheres to the territory as a part of the sovereignty not yet given away. The residuary powers of legislation still remain in the states. (*United States v. Bevan*, 3 *Wheat.* 336.)

The creation of liens, by means of attachment, is governed by the local and state laws, and when courts are called upon to construe state laws giving such liens, they should follow the decisions of the courts of the state. (*The U. S. Perry Manuf. Co. v. Brown*, 2 *Wood. & M.* 449. 10 *Law B.* 264.) Such lien has been enforced in numerous cases. (See note 3, *Id.* 640; 1 *Pars. M. L.* 449, note 1.) In the case of the ship *Harriet Olcott*, (*Id.* 229,) and the ship *Harvest*, (*Id.* 271,) *services* which were not maritime in their nature were enforced in admiralty, as they were made a lien on the vessel by the state law. (See note, 1 *Parsons' M. L.* 499.) In the case of the *People's Ferry Company v. Beers*, (20 *How.* 393,) the court says, district courts have recognized the existence of admiralty jurisdiction *in rem*, against vessels, to enforce claims, *where a lien had been created by the local law of the state*. Again, the 12th admiralty rules of the Supreme Court, till altered or repealed in 1859, provided "that there should be a proceeding *in rem* in cases of domestic ships, *where, by the local law, a lien is given to material-men for supplies,*" &c. (See note 2 to page 501 of 1 *Parsons' Maritime Law*.) Both defendants admit the plaintiff had a lien on the vessel. Wherever the *local law gives a lien* on a vessel, admiralty has jurisdiction *in rem* to enforce it. (*Cornish v. The Murphy*, 2 *Bro. Cor. Adm'ty Law*, 550, *App. Sloop*

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Mary, 1 *Paine's Circuit Rep.* 671. *The brig Draco*, 2 *Sumner*, 157.) All these cases are cited to show that the right of the state laws to create liens have been recognized in the fullest possible manner. And admiralty often enforced those liens *in rem* till the rule was changed, taking away the right, in 1859. So far, then, as this action is concerned, it is immaterial whether admiralty has or has not jurisdiction to enforce such lien *in rem*. If the lien existed, the condition of the bond is to pay such lien. That such lien did exist cannot be denied; the act of 1862 declares it in express terms, and the authorities above cited show it is a valid lien. The defendants admit that all the papers to perfect the plaintiffs' lien, and for the attachment under the act of 1862 and the attachment issued thereon, were regular and sufficient, according to the requirements of the act, the defendant Goodrich reserving his objection to the constitutionality of the act. The court found as a question of fact that the plaintiffs had perfected a valid lien, and, as matter of law, that the plaintiffs' claim was a subsisting lien upon the vessel.

II. In this case the Supreme Court had jurisdiction, because this was not a maritime contract. Maritime causes "are causes of action originating on the high seas, or growing out of maritime contracts." (*Burrill's Law Dic.*) Maritime contracts are contracts which relate to the navigation of the seas. (2 *Bouv. Law Dict.* 102. *Dunlap's Adm. Pr.* 41, 42, 43.) Because it relates to a ship, does not necessarily make it a maritime contract. It has been held repeatedly that a contract to build a ship is not a maritime contract. The language of the court is, "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation," or elsewhere, "it is a contract made on land to be performed on land." (*Minturn v. Maynard*, 17 *How.* 477. *Maguire v. Card*, 21 *id.* 248. *People's Ferry Co. v. Beers*, 20 *id.* 393. *Cunningham v. Holt*, *U. S. District Court, N. Y.* *Bradley*

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v. *Bolles*, Abb. Adm. 569.) The contract was to build a seaworthy vessel. On appeal, Mr. Justice Clifford dismissed the case for want of jurisdiction, on the ground that the contract was not of a maritime nature. To constitute a maritime contract, cognizable in admiralty, "it is indispensable that it should relate to commerce carried on by water, and even to render a tortious act thus cognizable, it must be shown to have been committed, or, at least, begun on water. (*The Orleans v. Phœbus*, 11 Peters, 175. *Conklin's Treat.* 4th ed. 254. *Brown v. The Hornet*, Crabbe, 426.) This contract did not in anywise relate to commerce carried on by water. It is for goods sold in Washington market, in the usual course of business. The vessel was laid up, and not engaged in commerce at all. This was proved and the court so found. It is not contended that admiralty had jurisdiction in such cases till its jurisdiction was extended by the act of congress, passed February 26, 1845." (*See 5 U. S. Statute at Large*, p. 526, chap. 20.) The admiralty courts have no common law jurisdiction. Their jurisdiction depends entirely upon the statute. That statute extends their jurisdiction so as to embrace maritime contracts, even in cases where they were to be performed wholly within the body of a county, "provided the vessel is enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories," &c. (1 *Brightley's Digest*, 25, sec. 3.) This vessel was not, at the time, "licensed for the coasting trade; her license had expired; she was not at the time engaged in business of either commerce or navigation between port and places in different states and territories." Nor was she in any manner engaged in commerce or navigation. She was laid up at the dock in this city, and therefore does not come within the acts. (1 *Brightley*, 25, sec. 3.) We therefore submit that this court has jurisdiction to enforce its lien by attachment. The plaintiffs' claim is admitted to

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be a just one. It is also admitted that he has taken all the necessary steps to perpetuate his lien; that the attachment is regular, provided the court has jurisdiction; also, that admiralty cannot give us an action *in rem*, because by a rule of court they have taken away this remedy. (*Maguire v. Card*, 21 *How.* 246.) Under such circumstances, this court should respect and follow the law of the state, and administer justice between the parties. Justice Nelson says, (21 *How.* 251,) "We have determined to leave all those liens depending on state laws, and not arising out of maritime contracts, to be enforced by the state laws." So in respect to the internal commerce of the states, which is the subject of regulation by their municipal laws, contracts growing out of it should be left to be dealt with by its own tribunals. (*Maguire v. Card*, 21 *How.* 251.) We claim this on two grounds: 1. The plaintiffs had a valid subsisting lien on the vessel by statute, and the condition of the bond is to pay all subsisting liens. And the defendants must do that, whether the attachment was the proper remedy to enforce the lien or not. 2. The transaction is not a maritime contract or transaction, and therefore admiralty has no jurisdiction of it.

By the Court, CLERKE, P. J. This case comes within the principles relating to admiralty jurisdiction, embraced in the recent decision of the Court of Appeals, *In Re Steamboat Josephine*, (39 *N. Y. Rep.* 19.) It is there decided that when the proceeding is against a vessel by name, whatever may be the nature of the claim, it is a proceeding in the nature and with all the incidents of a suit in admiralty, and that all such proceedings are, exclusively, within the jurisdiction of the district courts of the United States. Consequently a statute passed by a state legislature, conferring the right to a lien on a vessel, and to proceed against her by name, whatever may be the

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nature of the claim, is unconstitutional and void. To determine whether the debt is within the sphere of maritime jurisdiction, it is not necessary to ascertain for what purpose, or for whose use, it was contracted. If the proceeding is *in rem*, and against the vessel by name, this is conclusive, and *per se* shows that it is one of maritime jurisdiction, and exclusively within the jurisdiction of the district courts of the United States. I resisted this decision, in the Court of Appeals, for many reasons, constitutional and founded on decisions in courts of admiralty; but of course, as we consider this case is within that decision, it must, now, be controlled by it.

The judgment should be reversed, with costs.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Cardoso and Geo. G. Bernard, Justices.*]

BROOKMAN and another vs. HAMILL and others.

THE SAME vs. THE SAME.

An objection to the right of the plaintiff to maintain an action must be raised on the trial, if it be capable of being obviated; as where it is possible that new or additional evidence could be supplied, if a defect in the proof were pointed out.

But as an objection to the unconstitutionality of an act of the legislature cannot be obviated by any action of the plaintiff, the defendant is not bound to raise the objection, on the trial, that the statute under which the plaintiff sues is unconstitutional.

THE first of the above entitled actions was brought against the obligors on a bond, given pursuant to a statute of this State since declared unconstitutional.

In October, 1865, the plaintiffs and Henry F. Hamill (the latter being the owner of the steamship *King Philip*) made an agreement by which Hamill was to use certain wharves belonging to the plaintiffs for his vessels, for which

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use he was to pay them half the usual wharfage rates. The *King Philip* occupied these wharves for three months, and then left. An attachment was issued against her, under the act of 1862, (*Laws of 1862, ch. 482*), to relieve her from which the appellants gave their bond for \$1100, conditioned to pay "the amount of any and all claims and demands which shall be established to be due to the plaintiffs," and "to have been subsisting liens on the vessel, pursuant to the provisions" of the act referred to. By another act passed in 1860, (*Laws of 1860, ch. 205, § 2*), "the captain or owner of any vessel that shall leave a wharf without paying for the wharfage due thereon, and shall neglect to pay the same for twenty-four hours after demanded of the captain, owner or consignee, shall forfeit and pay to the owners of the wharf double the rates of wharfage hereby established, and the wharfage shall be a lien on the vessel." This action was brought on the bond to recover the wharfage due. The defendants set up and proved the contract, and offered to allow judgment for the amount fixed by the terms of the latter. The cause was tried before a justice of this court and a jury, and a verdict was rendered for the plaintiffs, under the charge, for double the rate agreed on by the parties, and interest for three days beyond what was claimed in the complaint. From the judgment entered on this verdict, the defendants appealed.

In the second action, it appeared that in October, 1865, the plaintiffs and Henry F. Hamill, (the latter being owner of the steamship *Pocahontas*) made an agreement by which Hamill was to use certain wharves, belonging to the plaintiffs, for his vessels, for which use he was to pay them half the usual wharfage rates. The *Pocahontas* occupied these wharves for three months, and then left. An attachment was issued against her, under the act of 1862, to relieve her from which the appellants gave their bond for \$1100, with a condition similar to that of the bond in the other case.

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This action was brought on the bond, to recover the wharfage due. The defendants set up and proved the contract, and offered to allow judgment for the amount fixed by the terms of the latter, but the court directed a verdict for double that amount, and added interest by way of penalty. From the judgment entered on this verdict, the defendants appealed.

E. T. Gerry, for the appellants.

E. Terry, for the respondents.

By the Court, CLERKE, P. J. These cases come within the scope of the decision of the Court of Appeals mentioned in my opinion in *Ferran v. Hosford* (*ante*, p. 200,) heard also during this present term. The only point taken by the plaintiffs' counsel on the argument, not taken in *Ferran v. Hosford*, is, that the objection to the unconstitutionality of the act of 1862 was not taken on the trial. This point undoubtedly would be tenable, if the objection, had it been raised on the trial, was capable of being obviated; as where it was possible that new or additional evidence could have been supplied. (*Rich v. Penfield*, 1 *Wend.* 380. *Lawrence v. Barker*, 5 *id.* 301.) But an objection to the unconstitutionality of an act of the legislature could not have been obviated by any action of the plaintiffs. No effort on their part could make a law constitutional which, at the time of the trial and at all times since its enactment, was unconstitutional; although the competent authority had not declared it to be unconstitutional, until some time afterwards.

The judgments should be reversed, with costs.

[NEW YORK GENERAL TERM, JUNE 7, 1869. *Clerke, Cardoso and Geo. G. Barnard*, Justices.]

BRECK *vs.* SMITH.

Sections 468 and 471 of the Code of Procedure continue the writ of *ne exeat* and the power to issue it, as a statutory remedy, in the *Supreme Court*. CLERKE, P. J., dissented.

Where a defendant does not move to vacate an order for a *ne exeat*, on the ground that he is in custody under the writ, but as having been discharged from custody on giving bail or security to the sheriff; and in his notice of motion he does not ask to have the bail bond or undertaking given up to be canceled, it is not erroneous for the court to deny the motion; as the writ can do him no harm, if he does not intend to leave the jurisdiction.

Although the codifiers may have intended to abolish the writ of *ne exeat*, it seems they did not succeed in doing so.

APPEAL from an order made at a special term denying a motion to vacate an order for a *ne exeat*, and the writ, after the defendant had been discharged from custody, on giving bail or security to the sheriff.

SUTHERLAND, J. The codifiers may have intended to abolish the writ of *ne exeat*, but I do not think they succeeded in doing so.

I suppose there never has been, or ever will be, a codifier who, at the close of his work, does not think that he has done many things that he has not done, and who has not done many things that he did not intend to do.

The act of December 14, 1847, amending the judiciary act of May 12, 1847, conferred on any justice of the Supreme Court, or county judge, the power, out of court, to allow writs of *ne exeat* in suits and proceedings in the *Supreme Court*. (*See Laws of 1847*, p. 640, § 13.) Section 471 of the Code expressly provides that part second of the Code "shall not affect" any special statutory remedy not heretofore obtained by action; and section 468 of the Code continues the practice before in use, to prevent a failure of justice, in a case where a remedy cannot be had by action according to or under the Code. It appears to me that these sections, especially section 471, continue the

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writ of *ne exeat*, and the power to issue it as a *statutory* remedy, in the justices of the *Supreme* Court.

The act of 1857 relating to the Superior Court of Buffalo (*Laws of 1857, p. 752*) would appear to be a legislative assumption of the continuance of the power of the Supreme Court to issue the writ.

The remaining question is, did the court below err in refusing to vacate the order for the *ne exeat* and the writ.

Considering that the defendant Smith did not make the motion as being in custody under the writ, but as having been discharged from custody on giving the bail, or security to the sheriff, and that he did not ask in his notice of motion to have the bail bond or undertaking given up to be canceled, I do not think it can be said that the court below erred in denying the motion.

It does not appear to me that it would have been right to have granted the motion on the answers and the affidavits denying any intention to leave the state or country. If the defendant did not intend to leave the jurisdiction of the court, he having given the bail and having been discharged from the arrest, what harm could come to him, or to his sureties, if things were left as they were.

I think the order should be affirmed, without costs to either party.

GEO. G. BARNARD, J., concurred.

CLERKE, P. J., (dissenting.) The writ of *ne exeat* was expressly abolished by section 178 of the Code of Procedure. The language of the section is, "No person shall be arrested in a civil action, except as prescribed in this act." Section 179 then enumerates the cases in which persons may be arrested; and cases in which the writ of *ne exeat* was allowed, are omitted. Arrest, therefore, in such cases, is prohibited.

But it is said that this writ is revived by the act of De-

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ember 14, 1847, (*Laws of 1847*, p. 640, § 13,) as it declares that any justice of the Supreme Court, or a county judge, may, out of court, allow writs of *ne exeat*, in suits and proceedings in the Supreme Court. I do not think that this incidental provision amounts to a repeal of section 178, so far as it concerns the writ of *ne exeat*. Repeal by implication is not favored; and, unless the later act takes some notice of the former, plainly indicating an intention to abrogate it, the later will not be deemed a repeal of the former. (*See Bowen v. Lease*, 5 *Hill*, 221; *Williams v. Potter*, 2 *Barb.* 316.)

If an incidental provision in an act be deemed a repeal of an express provision of a former act, it will make the confusion which we already have, in our law, "worse confounded," will mar any harmony that is left in it, and will open the door still wider to fraudulent legislation.

No notice whatever is taken, in the act of 1847, of sections 178 and 179 of the Code; there is no reference to it; it is not even incidentally named; indeed the person who prepared the act of 1847 was, probably, totally ignorant of the effect of these sections on the writ of *ne exeat*. The same remarks apply to the act of 1857, relating to the Superior Court of Buffalo.

If these acts do not repeal sections 178 and 179, as to their operation on the writ of *ne exeat*, and if they do not revive or create that writ, it cannot be considered a statutory remedy; and sections 468 and 471 have no application to it.

The order appealed from should be reversed, with costs, and the order allowing the writ, and the writ itself, should be vacated.

Order affirmed.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clarke, Sutherland and Geo. G. Barnard*, Justices.]

JESSE N. BOLLES, receiver, &c., vs. JOHN A. DUFF,
receiver, &c.

Where one is, by a decree of the court, declared to be a mortgagee in possession, and substantially or in effect to be a trustee of the equity of redemption, he will, by subsequently accepting the office of receiver of the same property, be deemed to have assumed the duties and responsibilities of such office, unqualified or unmodified by the circumstance that he had previously been declared to be a mortgagee in possession, or by the fact that he claimed the decree to be erroneous, and that he was, and might finally be held to be, the absolute owner.

Having been appointed receiver, and accepted the appointment, his relations, claims and interests as an individual, must not be permitted to interfere with his duties as receiver, or with the purpose or interests for which he was appointed.

His duty, as receiver, is to increase the surplus beyond what shall be found due him as mortgagee, by getting as large a rental as he reasonably can for the trust property; and on his applying to the court, as receiver, for authority to have it leased, it is his duty to lay before the court all the information he has, or can with reasonable diligence acquire, as to the situation and value of the trust property.

If such receiver applies to the court for an order authorizing him to lease the premises for a term of years, with a motive or purpose inconsistent with his duty and position as receiver, and an order granting such authority is made by the court, inadvertently, without careful scrutiny, and further inquiry, by a reference or otherwise, as to the situation and value of the property, and the propriety of making the order, the order should be reversed.

If the lease executed by the receiver, under such an order, is declared void, it will be with a reservation to the lessee of the right to occupy the premises for one year from the date of his lease.

APPEAL by the plaintiff from an order made at a special term, authorizing the defendant, as receiver, to lease certain premises in the city of New York, known as the Olympic Theater, to James E. Hayes, for the term of three years, from the 1st day of September, 1868.

B. C. Thayer, for the appellant.

A. Oakley Hall, for the respondent.

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SUTHERLAND, J. Preliminarily to the argument of this appeal, the majority of the court decided that the papers handed or sent to the judge who made the order appealed from, upon due notice to the attorney for the defendant, after the argument and submission of the motion, had been properly printed as a part of the appeal papers, and were to be considered by the general term, in determining the questions presented by the appeal. As to these papers, the majority of the general term substantially held that if the learned judge who made the order appealed from did not consider them, in making the order, as it appears from his opinion he did not, he ought, considering the nature of the order asked for, and the circumstances under which it was made, to have done so.

The decree of Judge Potter declared the defendant, Duff, to be a mortgagee in possession, but it also substantially, or in effect, declared him to be a trustee of the equity of redemption; and he being such mortgagee and trustee, the court appointed him receiver also. By accepting the office or position of receiver, he must be deemed to have assumed the duties and responsibilities of a receiver, unqualified or unmodified by the fact or circumstance that he had been declared to be a mortgagee in possession, or by the fact or circumstance that he claimed the decree to be erroneous, and that he was, and finally might be held to be, the absolute owner. His relations, claims and interest, as to the property, might have been, and probably were, urged against the fitness of his appointment as receiver; but having been appointed, and having accepted, such relations, claims and interest must not be permitted to interfere with his duties as receiver, or with the purpose or interests for which he was appointed. He was declared a trustee, and appointed a receiver, upon the theory that he was sure to receive the amount found due him, as mortgagee, as the result of the accounting, and

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that there would, or might be, a surplus for distribution among the creditors of Trimble.

The duties and position of the defendant, relative to the trust property, must, for the purposes of this appeal, be considered as fixed by the decree of Judge Potter, and by the defendant's acceptance of the office or position of receiver. His duty as receiver clearly was to increase the surplus beyond what should be found due him as mortgagee, by getting as large a rental as he reasonably could for the trust property; and on his application to the court, as receiver, for authority to lease, it was his duty to lay before the court all the information he had, or could with reasonable diligence have acquired, as to the situation and value of the trust property.

In my opinion, the circumstances under which the order appealed from was made, show that it is highly probable that the defendant did not make his application to the court with the good faith, and impartial and disinterested purpose, called for by his office or position of receiver; and these circumstances, also, in my opinion, show that the court should have carefully scrutinized the application; and that the order should not have been made without further inquiry, by a reference or otherwise, as to the situation and value of the property, and the propriety of making the order.

I will refer to some of these circumstances, as shown by the papers:

1st. The application was for authority to lease to Hayes, the son-in-law of the receiver, and not an application for authority to lease to whoever might be found willing to take a lease, upon terms and conditions most advantageous for the trust estate, or those whose interests were represented by the receiver.

2d. The provision in the order of Judge Smith, restraining the receiver from making any new lease to Hayes, or extending or renewing the lease to him, &c.,

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without the *special leave of the court, granted on due notice to the plaintiff's attorney*, should have led the court to carefully scrutinize the motive or purpose of the application, which was virtually an application to renew or extend a lease to Hayes, and should have led to further inquiry as to the condition and value of the trust property, and the propriety of making the order, before making it.

3d. The circumstance that the application came before the court, supported by verified opinions of certain individuals, as to what would be a fair rent for the property, *without including scenery, properties, &c.*; which opinions were given and verified, in answer to the inquiry of the receiver, carefully put, as to what would be a fair rent per year, *without including scenery, properties, &c.*; and which opinions were *ex parte*, and preliminarily obtained for the purposes of the application, should have induced the same scrutiny of the motive and good faith of the application; and should have led to further inquiry as to the condition and value of the property, and the propriety of making the lease; and especially as to the propriety of leasing the theater *without scenery, &c.*, the papers showing that there was a large amount of scenic and other properties belonging to the theater and to the trust estate, which it would have been most advantageous to have leased with the theater.

4th. The verified opinions of Earle, Hess, Gibson, Barnum, Tamaro and Morris, that \$20,000 would be a fair annual rent for the theater, *without scenery, &c.*, and the verified opinions of several of them, that with scenery, &c., \$22,000 to \$25,000 would be a fair rent; and that to rent the theater without the scenery, &c., would be a sacrifice to the estate, as the scenery, &c., would be of little use if removed from the theater, certainly should have led to the same scrutiny of the motive and good faith of the application, and to further inquiry on the part of the court, especially as to whether the scenery, &c.,

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belonging to the theater and the trust estate should not be leased with the theater.

5th. The unverified offer of Barney Williams, by letter, to take a lease for one, two, three, four or five years, at the yearly rent of \$21,000, with security, if required, of the theater, scenery, &c., belonging to the trust estate, (which offer appears to me perfectly consistent with the previous verified opinion, which the defendant had obtained from him, as to rent *without* scenery, &c.,) and his subsequent letter increasing this offer to \$25,000 per year; and the offers of Mr. Sim and Mr. Hess, by letters, to take a lease for one, two or three years, of the theater and scenery, &c., belonging to the trust estate, the one at a rent of \$25,000, with security, and the other at a rent of \$22,000, with security, should certainly have induced the same scrutiny as to the motive and good faith of the application, and should have led the court to make further inquiry as to the condition and value of the trust property, by a reference or otherwise, before granting the application and making the order appealed from.

Without referring specially to other circumstances appearing on the face of the papers, I think those which have been mentioned show that the order appealed from was inadvertently made, and that the application for it was made by the receiver with a motive or purpose inconsistent with his duty and position as receiver.

I do not see the force of the circumstance suggested in support of the order, that Mr. Hayes had, under the first lease, expended a large sum of money for permanent improvements, &c. Mr. Hayes and the receiver must be presumed to have known the law and the terms of this prior lease, and that such of these improvements as were fixtures, as between tenant and landlord, increased the value of the property, and called for an increased annual rent.

I will add, that the strenuous efforts of the defendant,

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as receiver, through eminent counsel, to retain the order as made, without reversal or modification, should lead us to suspect the good faith of his application, as receiver, for the order appealed from; for *as receiver* he cannot be permitted to say that he had, or has, any interest, other than his representative or official interest as receiver, or indeed any interest, to be, or which can be, prejudiced, impaired or affected, by a reversal or modification of the order.

Upon the whole, I think the order should be reversed, as made inadvertently, and without sufficient consideration being given to the circumstance that the defendant made the application *as receiver*, or to the conceded circumstances under which it was made, tending to show, at least, that the receiver might have made and supported his application with a purpose inconsistent with his duty as receiver.

But I do not think Mr. Hayes, the lessee, should suffer all the probable consequences which would follow from an absolute, unconditional reversal of the order.

I think the order of reversal should have a provision, or condition, inserted in it, that such reversal shall not impair or any way prejudice Mr. Hayes' possession or rights under the lease, for and during the residue of *the first year of his term*; that is not before, or until the first day of September next, (1869,) but that from and including the first day of September next, (1869,) the lease shall be void and of no effect, and that he, continuing in possession thereafter, shall be considered as a tenant holding over without the permission of his landlord, after the expiration of his term, and as in contempt of such order of reversal.

I am not sure that it would be right to break up Mr. Hayes in the height of the current theatrical season, and therefore I think the order of reversal should be conditional, as above stated.

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The order should also be reversed without costs to either party.

CLERKE, P. J., concurred.

GEO. G. BARNARD, J. (dissenting.) The defendant, Duff, is in possession of the property in question, claiming to own the same. By an interlocutory judgment of this court, it has been decided that he is in possession as mortgagee, and not as owner. Pending the final decision of this question, Duff has been appointed receiver. He has a large interest in the property if only mortgagee in possession. The plaintiff is a receiver appointed upon proceedings supplementary to execution in an action where judgment was obtained against John M. Trimble and William Fowler, for \$1594.38. Trimble is alleged by the plaintiff to be the owner of the property. The defendant, Duff, applied at chambers for leave to lease the property to James E. Hayes. This was opposed, and the papers show these facts. Hayes had been the lessee for the year ending 31st of August, 1868, at the rent of \$15,000. He had expended some \$22,000, in addition to his rent, in permanent improvements upon the property; he had established an excellent reputation for the same. It was a theater property, and its value was largely increased as well by the money outlay in improving the same as by the successful management of the business conducted in it. No one other than Hayes applied to lease prior to the application for leave by Duff to lease to Hayes. Hayes applied for the lease at a reduced rent, in consideration of what he had done to benefit the estate. The affidavits of seven competent judges, of the value of the rental of such property, was annexed to the application for leave, fixing such value at from \$12,000 to \$15,000 per year. The affidavits of six equally skilled persons, attached to the opposing papers, show their opinion of the value to be

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not less than \$20,000. In addition to this, there were five offers to take the lease for \$20,000 and upwards. Some of these offers contained these impossible conditions, "with the understanding that such scenery, properties and fixtures as the court may decree to belong to the estate of the late John M. Trimble shall remain in the building to be used by me." Nearly all the offers contained this as a similar condition. The court granted leave to lease to Hayes for \$15,000 per year, and to keep the same in repair. In view of all the facts, I think the lease to Hayes was the best for all concerned. He had expended much money, and had maintained a good and attractive theater. He alone agreed to keep the same in repair during his new lease, at his own cost and expense. He released any claim he had for previous repairs and improvements under the old lease. He agreed to maintain a first class theater, and to do nothing to injure the repute or good will of the same. The undisputed cost of these repairs for the previous year; the consent to continue the same; the punctual payment of the rent; the successful management of the business; must all be taken into the account, and then it is quite clear that the offer of Hayes was better than any made. The order should, I think, be affirmed, with costs.

Order reversed.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Sutherland and Geo. G. Bernard*, Justices.]

SMITH and others vs. SMALL and others.

One partner cannot arrest his copartner. 'The very nature of a partnership forbids this.

Each partner is a joint owner, as well of capital as of property purchased with it. If the capital be misappropriated, by a partner, no remedy is furnished by action at law; unless a balance be struck and a promise made, to pay the same.

Where, by an agreement, there is to be a joint contribution of capital, by the parties, and there is a joint ownership of the property, and an agreement to share profit and loss, the parties are partners.

If, under such an agreement, some of the partners receive, from the others, a sum of money to be applied to the purchase of the article in which the parties are to deal, and for the buying and selling of which the partnership was formed, which they fail so to apply, an order of arrest cannot be granted.

Nor will an order of arrest be granted, as between partners, where it appears that the sum claimed of the defendants was only the difference between the price at which the plaintiffs directed the partnership purchases to be made, by the defendants, and the sum actually paid by the latter therefor, and which they claim was to be charged against their share of the profits, upon final settlement.

A PPEAL from an order made at a special term, vacating an order of arrest.

By the Court, GEO. G. BARNARD, J. Under the first agreement, the parties to this action were partners. There was, under it, to be a joint contribution of capital. There was a joint ownership of the property of the firm, and an agreement to share profit and loss. The plaintiffs claim that under this agreement the defendants received of them the sum of \$11,800, which they failed to apply to the purchase of the article in which the parties were to deal, and for the buying and selling of which the partnership was formed. Assuming this to be true, it does not present a case in which an order of arrest can be granted. One partner cannot arrest his copartner. The very nature of a partnership forbids this. Each partner is a joint owner, as well of capital as of property purchased with it. If the capital be misappropriated, no remedy is furnished by

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action at law, unless a balance be struck and a promise made to pay the same. Such an action would be upon the promise, and not upon the misappropriation, and would be contract, and not tort nor fraud, or for breach of trust.

The second agreement as to this claim does not vary the relation of the parties. By it, indeed, the title to the partnership property is put nominally in the plaintiff, but it did not make wrongful, acts or omissions not wrongful under the first agreement. If the second agreement gave a right of action for the sum of \$11,800, it is because of the agreement, and the defendants are not liable to arrest. It is only a contract, based, it is true, upon a prior conversion of partnership property, but still contract.

Upon the plaintiffs' claim I think this order should be affirmed. The defendants say, in their papers, that the sum of \$11,800 was only the difference between the price which the plaintiffs directed the partnership purchases to be bought at, and the sum actually paid by the defendants therefor. That the same was to be charged against the defendants' share of the profits upon final settlement. No order of arrest could be granted, if this was the true foundation of the plaintiffs' claims.

Order affirmed, with \$10 costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clark, Sutherland and Geo. G. Bernard*, Justices.]

In the matter of the application of **FREDERICK D. TAPPAN**,
to vacate certain assessments.

The common council of the city of New York are authorized to assess the costs of a local improvement upon the property benefited thereby.

The fees of the officers who do this duty are a part of the costs of the work. No confirmation of such assessments, by the common council, is necessary; that duty devolving upon the *board of revision* created by chapter 808 of the laws of 1861.

The act of the legislature of 1861, creating a board of revision, is not void as infringing the constitution of the state. The subject of the act is expressed sufficiently in its title. It is, "An act relative to contracts."

If the names of the owners and occupants of property assessed are the same, in an assessment, as upon the tax lists of previous years, this is all the law requires in respect to the mode of stating the names of owners and occupants.

The common council has the power, by ordinance, to direct the filling of sunken lots, and in case it deems it necessary, to do the same at the expense of the owners, forthwith.

It is the duty of the common council to assess the cost of the improvement upon the property benefited, and not to cast that burthen upon the taxpayers at large.

A PPEAL from an order made at a special term, denying the application of Frederick D. Tappan, to vacate certain assessments of property in the city of New York.

The objections to the assessments were as follows:

First. It was objected, to all the assessments, that they included a charge for assessing. The gross amount charged for assessing was \$705.75.

Second. That the assessments had never been confirmed by the common council.

Third. That they did not state the name of the owner or owners, occupant or occupants, of the property assessed.

Fourth. It was specially objected to two of the assessments, (Nos. 2 and 3,) that they were irregular, for the reason that there was no authority to lay an assessment for filling sunken lots, and also for the reason that the ordinance should require the owner to fill the lots, before the work was done by the city.

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Fifth. To the assessment numbered 6, it was specially objected that it was irregular, for the reason that the ordinance required the work to be done *where necessary*.

Sixth. To the assessment numbered 7, it was specially objected that the whole cost of the work was assessed upon the property owners; whereas the ordinance required that only one half of the expense of the work should be borne by the property owners.

Charles E. Miller, for the petitioner and appellant.

Richard O'Gorman, counsel to the corporation, *contra*.

By the Court, GEO. G. BARNARD, J. I am not satisfied that the charge for making assessments is illegal. The common council are authorized to assess the cost of a local improvement upon the property benefited thereby. The fees of the officers who do this duty are a part of the cost of the work. These officers are now paid by a salary from the city treasury. It is just that the expenses of an office created for, and having no other duty to perform than to assess the costs of those improvements upon the lands which ought to pay therefor, should be paid as the other expenses are paid. It appears that the salaries of these officers are over seven thousand dollars per year; but it does not appear what further expense is incurred by the city in relation to the office. It does not, therefore, appear that any greater sum has been charged than the actual expense to the city in making the assessments. It has been repeatedly held by this court that an assessment will not be set aside because the charge for assessing is contained in it. No confirmation was needed by the common council. By chap. 308 of laws of 1861, a board of revision was created, whose duty it was made to confirm such assessments. This law is not void as infringing the constitution of the State.

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The subject of the act is expressed sufficiently in its title. It is, "An act relative to contracts." The assessment is based upon a contract, and this board of revision was created to do what the common council had done before the passage of the act. Their action was necessary to give validity to the contract made for a street improvement. The various means by which the legislature reach a result are not necessary to be set out in the title of the act; only the subject on which legislation is proposed.

No valid objection can be maintained by reason of the manner in which the names of the owners and occupants are stated in the assessment. The law specifies (*Chap. 826, Laws of 1840*) the person to whom the surveyor and assessors having charge of an assessment shall go for their information. It was to "the collector of taxes of the previous year," of the ward in which the lands were situated. The names of the owners and occupants are the same in this assessment as upon the previous year's tax list. This is all the law requires. (*Paillet v. Youngs, 4 Sand. Rep. 56.*) The common council had the power by ordinance to direct the filling the sunken lots, and in case it deemed it necessary, to do the same at the expense of the owners, forthwith upon the passage of the same. (*2 Rev. Laws 1813, p. 446, §§ 270, 271. Laws of 1824, p. 39, § 2.*)

It was the duty of the common council to assess the cost of the improvement upon the property benefited, and not cast this burden upon the tax-payers at large. I am of opinion that the order at special term should be affirmed, with costs.

Order affirmed.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Geo. G. Bernard, Clerks and Sutherland, Justices.*]

CLAFLIN and others vs. THE FARMERS AND CITIZENS'
BANK OF LONG ISLAND.

An appeal from a judgment, in the name of a State bank subsequently merged in a National bank, is the *defense of a suit*, within the meaning of the second section of the act of the legislature, of March 9, 1865, (*Laws of 1865, p. 169,*) which provides that any State bank, by its organization under the laws of the United States, shall be deemed to have surrendered its State charter, but that "every such bank shall nevertheless be continued a body corporate for the term of three years * * for the purpose of *prosecuting and defending suits* by and against it, and of enabling it to close its concerns," &c. And if such appeal is taken within the three years from the time of its conversion into a National bank, the State bank must be deemed to continue in existence *as to such appeal or defense of the suit*, until the appeal is heard and determined.

In case of the failure of the National bank, and the appointment of a receiver, such receiver may take, and has a right to prosecute, such appeal, under section 121 of the Code.

APPEAL from an order made at a special term, denying a motion by the plaintiffs to dismiss an appeal from the judgment in this action.

By the Court, SUTHERLAND, J. The order appealed from, denying the plaintiffs' motion to dismiss the appeal, should, I think, be affirmed.

The defendant was converted into a National bank, on the 20th of May, 1865. The National bank failed 5th September, 1867, and Frederick A. Platt was appointed its receiver, under the act of congress. The judgment on the third check, for \$10,848.15, was recovered on the 16th of December, 1867, and was appealed from by the defendant on the 28th of the same month.

The second section of the State act, of March 9, 1865, (*Laws of New York of 1865, p. 169,*) provides that the State bank, by its organization under the laws of the United States, shall be deemed to have *surrendered* its state charter, but that "every such bank shall nevertheless be *continued a body corporate for the term of three years * * for*

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the purpose of prosecuting and defending suits by and against it, and of enabling it to close its concerns," &c.

I think the appeal from the judgment, in the name of the State bank was, and should be considered, as the defense of a suit, within the meaning of this section; and having been taken within the three years from the time of its conversion into a National bank, that the defendant, by force of the second section of the State act, must be deemed to continue in existence, *as to such appeal, or defense of the suit, until the appeal is heard and determined.*

It is very clear to me that the receiver of the National bank, whose duty it was, under the National act, to collect the assets of the National bank, had a right to take, and has a right to prosecute the appeal, under section 121 of the Code; for we must assume that by the National act, and the sixth section of the State act, all the assets of the State bank vested in the National bank; and that if the judgment should be reversed, the receiver, *as such*, would have the benefit of the judgment for the restitution of the property sold under the execution issued on the judgment.

The order appealed from should be affirmed, with \$10 costs.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clerke, Sutherland and Geo. G. Barnard, Justices.*]

DICKERSON and others *vs.* WASON and others.

Where one banker receives from another a promissory note, made by third persons, for collection merely, with instructions to remit the proceeds, when paid, in a draft, which note is subsequently paid by the makers, the receiver giving credit therefor to the person from whom he receives it, without any knowledge or notice that any other person than the one transmitting it to him has any interest therein, he has a right to retain the proceeds as against the true owner, on account of a balance due to him from the transmitter.

ON the 21st July, 1863, the plaintiffs were the owners of a promissory note, made by R. P. Myers of Cleveland, for \$316.45, payable to the order of L. A. Carmer, and by him indorsed in blank. This note matured August 27, 1863. On the 21st July the plaintiffs indorsed the note and deposited it with Van Saun & Son, in New York city, for collection. On the next day Van Saun & Son sent it in a letter to Wason, Everett & Co., the defendants, stating, "inclosed we hand you for collection, * * * and when paid remit proceeds in draft on New York," &c. "Protest if not paid." "Please report collection by numbers." The note thus inclosed was indorsed by Van Saun & Son, as follows: "Pay Wason, Everett & Co., or order, for collection." It was received by the defendants about July 24, and collected at maturity, August 27, 1863. On this day the defendants heard that Van Saun & Son had stopped payment. They never remitted to them the proceeds of this note, nor any other money after the 27th August, the day it was paid. The defendants had, however, prior to this date, sent to Van Saun & Son, August 12th, \$572.73; August 14th, \$1049.60; and August 18th, \$155.22. Between August 11th and 25th, inclusive, Van Saun & Son had sent the defendants paper for collection in various amounts. And when the former stopped payment the defendants were indebted to them in account current in the sum of \$5.82, after charging themselves with the proceeds of the note in question. The defendants did not credit this note to Van Saun & Son until it was paid, August 27, at matu-

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city. Nor had they made any arrangement to take the note or to buy it at any price, before maturity. The remittances made to Van Saun & Son by the defendants were of paper received from their customers in the course of their business, and payable in New York. They were not made on account of the note in question, but "as a general remittance on account current." "We inclose for credit," &c. The defendants knew that Van Saun & Son's business included that of making collections, and theirs was the same. The business between Van Saun & Son and the defendants began in 1859. At first they "used to remit drafts on themselves at their request, but latterly by mutual agreement we [the defendants] advised them to their credit." The specific proceeds of collections had not been sent "since the new arrangement now spoken of, and which was made a year and a half prior to their (Van Saun & Son's, Aug. 27, 1863) failure." The exchange on the note appeared to have been received by the defendants as compensation for the collection, crediting Van Saun & Son simply with the face of the note. Van Saun & Son had advanced no money on the note in question. It belonged to the plaintiffs.

The defendants in their answer, among other things, alleged that they and Van Saun & Son had an agreement and understanding with each other that the defendants might, before the maturity of any paper in the defendants' hands received from said Van Saun & Son, advance to said Van Saun & Son money thereon, and pay for and purchase the same, and retain and keep said paper and the proceeds thereof, when collected, to reimburse the defendants for such advances to Van Saun & Son; that pursuant to said habit, practice and agreement, said note set forth in the complaint was received by the defendants from said Van Saun & Son on or about the — day of July, 1863, under the supposition and belief of said defendants that Van Saun & Son owned the same, and without any knowledge or notice

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that the plaintiffs, or any other persons than said Van Saun & Son, had any interest or property therein; that the defendants knew the maker of said note, and knew that he was good and responsible, and that the same would be paid at maturity; and that under said agreement and understanding between them as aforesaid, the defendants, after receipt of said note by them, and before the maturity thereof, and before the 21st day of August, 1863, advanced to Van Saun & Son thereon money equal to the full value and amount of said note, in good faith, without any knowledge or notice that the plaintiff, or any other person or persons than Van Saun & Son, had any interest or property in said note; whereby the defendants were, before said 27th day of August, 1863, entitled to said note and the proceeds thereof, and owned the same.

On the 6th day of October, 1863, the plaintiffs having traced the proceeds of their note into the hands of the defendants, (who upon demand refused to pay,) this action was brought to recover the amount. The case was tried before Justice Cardozo and a jury. The evidence having been closed, the plaintiffs asked the court to instruct the jury to find a verdict for the plaintiffs, but his honor instructed the jury that there was no question of fact for them to pass upon, and directed them to find a verdict for the defendants; to which ruling and instructions the plaintiffs' counsel excepted. The jury having rendered their verdict for the defendants under the direction of the court, the exceptions were thereupon ordered to be heard in the first instance at the general term, and the judgment in the meantime suspended.

Abram Wakeman, for the appellants. I. At the close of the case the court should have directed the jury to find a verdict for the plaintiffs, as requested by their counsel. Their title to the note was not questioned. Van Saun & Son received it simply as agents for collection, and the

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defendants could make no valid claim to it, or to the proceeds of it, unless they showed that they parted with value for it in good faith and without notice. (*McBride v. The Farmers' Bank*, 25 Barb. 657; affirmed on appeal, 26 N. Y. Rep. 450. *Commercial Bank of Clyde v. Marine Bank*, Transcript Appeals, vol. 36, p. 302. *Hoffman v. Miller*, 9 Bosw. 334.) The defendants claim, however, that the case at bar is distinguishable from these authorities, upon the ground that they parted with value to Van Saun & Son on the faith of the note in question and of other paper received by them for collection.

II. But this ground is not available to the defendants; because the form of the indorsement and the instructions of Van Saun & Son, which accompanied the note, did not authorize them to take it to their account. (1.) The indorsement by Van Saun & Son was a restrictive one, to wit: "Pay Wason, Everetts & Co., or order, for collection." With this indorsement, the defendants could not have negotiated it before maturity; in other words, could not have treated it as their own. All they had any right to do was to hold the note, and when due collect it. Had they attempted to sell it, the purchaser would have seen that they had no negotiable title to it, and only held it for collection. But a right to take the note to their own account involved the right to sell it. It is manifest, therefore, that as between Van Saun & Son they, the defendants, had no right to take the note to their own account. (*Sigourney v. Lloyd*, 8 B. & C. 622.) (2.) But it may be claimed that the custom and mode of business between the defendants and Van Saun & Son, established a year and a half before this note became due, expressly authorized the taking of the note to their account. To this we reply that Van Saun & Son having parted with no value for the note, and being mere agents of the plaintiffs for its collection, in this particular instance, expressly abrogated the usual mode of business between them and their correspondents,

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and specially instructed the defendants that the note was handed them for collection, and when paid to remit the *proceeds* in draft on New York, and to protest if not paid. For a year and a half they had in no case remitted the specific proceeds. The instructions of the defendants were: "We inclose for credit," or "place to our account when paid," and "by mutual agreement." This was the mode of business between these parties. Now it is not easy to see how, in view of this single express revocation of this order of business, and in the face of these specific instructions from a principal, the agent can claim the right to deal with this note as he pleased, and in so doing, claim that he acted in good faith. (*Van Amee v. The President &c. of Bank of Troy*, 8 Barb. 312; *approved*, 26 N. Y. Rep. 450, 455. *Warner v. Lee*, 2 Selden, 144. *Sweeney v. Easton*, 1 Wall. U. S. Rep. 166.)

III. The defendants have not shown themselves holders for value on the faith of the note in question. The remittances they made to Van Saun & Son, after receiving the note from them, were not made on account of the note in question, and did not authorize Van Saun & Son to apply any portion of them to the note. "We sent them," (say the defendants,) "to be passed to our credit as a general remittance in account current." They were not a loan or advance to Van Saun & Son in any sense, but were sent for the defendants' convenience, as they received them from their customers. Of course, the defendants had a right to draw against or to assign them.

IV. Van Saun & Son were in good credit up to the 27th August, 1863, and were employed by the defendants to make collections for them as their agents. Van Saun & Son, in like manner, employed the defendants. Neither party made discounts for, or loans or advances to the other, but the balances of account from time to time, either way, were merely accidental. Each party knew the other was doing a business—partially, at least, fiduciary in its char-

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acter—and neither party had the right, therefore, to make loans or advances on the faith that the securities received from the other were his own property; certainly not in the face of the specific instructions given in relation to the note in question.

V. Upon the whole case, we insist that the judge erred at the trial in directing a verdict for the defendants, and that this court should now order that judgment be rendered for the plaintiffs, with costs.

A. R. Dyett, for the respondents. The defendants contend that the case of *The Commercial Bank of Olyde v. The Marine Bank*, (1 *Trans. Ap. Cases*, p. 302,) reported since the decision of the general term, in this case, overrules it. Justice Cardozo did not think so; and by reading the facts of the case, and referring to the last clause in the opinion, on the last page, (306,) it will be seen that the second paragraph of the syllabus of the case correctly states the point decided, and that so far from overruling the decision of the general term in this case, it is in entire harmony with it and with the opinion of Mr. Justice Ingraham. The judgment should be affirmed, with costs.

GEO. G. BARNARD, J. This case was once before the general term of this district. At that time the judgment was set aside, and a new trial ordered. The opinion of the justice decided that the plaintiff could not recover. On the second trial a judgment was ordered for the defendant. I think it was right. (48 *Barb.* 412.)

The judgment should be affirmed, with costs.

CLERKE, P. J. I concur in the above conclusion. The case referred to by the plaintiffs' counsel (*McBride v. The Farmers' Bank of Salem*, 25 *Barb.* 657; 26 *N. Y. Rep.* 650) does not support his position. It was there held that, to justify the receiving bank in retaining the proceeds of

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the notes, a credit must have been given on the strength of the particular notes or their proceeds. In the case before us this is precisely what was done by the defendants, in respect to the note in question. They gave credit for it to Van Saun & Son, from whom they received it.

CARDOZO, J. I concur in the conclusion that this judgment, in reference to the previous action of the general term, when the case was first before it, should be affirmed. But I do not wish to be understood as assenting to the correctness of that decision.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clarke, Cardozo and Geo. G. Barnard, Justices.*]

THE NASSAU BANK *vs.* THE BROADWAY BANK.

A check, after having been indorsed by the payee and another person, was presented at the bank, and certified to be "good." Subsequently, the drawer, discovering that he had been defrauded, directed the bank not to pay the check; and when it was presented for payment, the latter wrote across its face, "payment stopped," and returned it to the payee. The latter, after erasing the words "payment stopped," so that they could not be read, and affixing a revenue stamp over the erasure, transferred the check to another person, through whom the plaintiff received it in deposit for collection, in the ordinary course of business, in good faith, without knowledge or notice of the circumstances, and without sufficient appearing on its face to put the plaintiff on inquiry. *Held* that the plaintiff was to be deemed a *bona fide* holder of the check for value, and entitled to recover the amount thereof from the drawee.

APPEAL from a judgment entered upon the report of a referee.

The action was brought upon a check drawn by R. Maplesden, upon the defendant, payable to the order of

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A. C. Baker, and indorsed by said Baker and one Burnham, and certified by the defendant to be "good."

The defendant, by its answer, *First*. Admitted that the plaintiff and the defendant were corporations, as in the complaint alleged, and that a check similar to the one in said complaint described, and which the defendant believed to be the same, was drawn by Reuben Maplesden, in the complaint described, and delivered to one Zeno Burnham, but without any consideration whatever.

Second. The defendant denied that Burnham delivered the same to one Alvan C. Baker, or that the same was ever delivered to the said Baker; and the defendant further denied that the said Alvan C. Baker ever indorsed the same, or delivered the same to any person whatever.

Third. The defendant denied that the said check at any time came lawfully into the possession of the plaintiff, or that the said plaintiff gave any consideration whatever therefor; but, on the contrary, the defendant alleged, upon information and belief, that the plaintiff took the same without any consideration, and with full knowledge and notice that the same was of no value whatever.

Fourth. The defendant alleged that before the presentment of said check to the defendant for payment, the defendant was ordered and directed by the said Maplesden not to pay the same, and was duly notified and informed, by the said Maplesden, that said check was obtained by the false and fraudulent representations, and in the manner thereafter set forth, and without any consideration therefor. That thereupon the defendant refused to pay the said check, and marked across the face thereof the words "payment stopped," in writing, and the same was returned to the said Burnham, who claimed to be the owner and holder thereof.

Fifth. The defendant further alleged, in substance, that the said check was given in part payment for furniture, &c., purchased by Maplesden at a "mock auction" con-

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ducted by Burnham, at which the said Maplesden was cheated and defrauded by means of the false representations and devices of the said Burnham and his confederates. That said Maplesden, as soon as he discovered that he had been cheated and defrauded, demanded the return of said check from Burnham, and gave him notice that he would not receive any of said goods, and he has not at any time received or accepted any of said goods, and he has not received any consideration whatever for said check. And the defendant further alleged, upon information and belief, that the plaintiff was duly notified of, and had full knowledge of, all the facts herein set forth, at the time of receiving the said check; that it was duly notified the same had been fraudulently obtained from the said Maplesden, and was of no value, and the said plaintiff did not give any consideration therefor. That the plaintiff was not the lawful owner and holder of said check, and the defendant was not indebted thereon in any sum whatever to the said plaintiff.

The referee (John T. Hoffman, Esq.) found the following facts: 1st. The plaintiff and defendant are banking corporations, organized pursuant to an act of the legislature of the State of New York, entitled "An act to authorize the business of banking," passed April 18th, 1838, and the acts amending the same.

2d. On the 25th day of February, 1863, at the city of New York, one R. Maplesden made his check in writing, bearing date on that day, directed to the defendant, to pay to Alvin C. Baker or order the sum of \$500, and delivered the same to the said Baker.

3d. The said defendant, about the day of the date of said check, certified in writing upon the face thereof, that the same was good.

4th. The said Baker indorsed the said check in blank; the same was afterwards indorsed in blank by Zeno Burnham, and being so indorsed, afterward, and on or about

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the 2d day of June, 1863, came into the possession of the plaintiff, who then became, and at the time of the commencement of this action was, the lawful owner and holder thereof.

5th. The equities were such, as between the said Alvan C. Baker the payee, Zeno Burnham his indorsee, and the said Maplesden the maker of said check, that neither the said Baker nor the said Burnham could recover upon said check, against said Maplesden, but the plaintiff received said check in the ordinary course of business, in good faith, for value, without notice of such equities, or of any facts sufficient to put them upon inquiry in relation thereto.

6th. After said check was made and certified as above mentioned, and while the same was held by the payee thereof, the defendant was requested by the maker thereof not to pay the same, for the reason that the consideration thereof had failed; and after such request, and while the payee held the said note, it was presented by him to the said defendant for payment, and the defendant refused to pay the same; and having it in possession, caused to be written across the face thereof the words "payment stopped," and returned the same to the said payee; and afterwards, and before the said check came into the possession of the plaintiff, the said words "payment stopped" were erased, so that the same could not be read, and a revenue check affixed over said erasure. The plaintiff, when it received said check, had no knowledge or notice of any of said circumstances, nor was there sufficient appearance upon the face of the said check to put it upon inquiry in relation to the same.

7th. After the plaintiff became the holder and owner of said check as above mentioned, and on or about the 3d day of June, 1863, it caused payment of said check to be demanded of said defendant, which was refused.

8th. The interest on said check from the date of said presentation to the date of the report was \$40.83, and the

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principal amount of said check, as well as said interest, was wholly due and unpaid.

The referee's conclusion of law, upon the facts aforesaid, was: That the plaintiff was entitled to judgment against the defendant, for said principal and interest, amounting together to the sum of \$540.83.

The following reasons were given by the referee, for his decision: "It is admitted that the equities were such, between the payee of the check in suit, his indorsee Burnham, and the maker, that neither the said payee or indorsee could recover thereon against the maker. It was not denied that the defendant, the Broadway Bank, could avail itself of the same equities by way of defense to an action brought by either the said payee or his indorsee, and that those equities would defeat this action unless the plaintiff was found to be a *bona fide* holder of the check, without notice of such equities.

The question, therefore, for me to determine, is whether the plaintiff is such *bona fide* holder.

Upon the evidence in the case it appears that the check, when in the hands of the payee, and after it had been accepted by the defendant, was presented to the defendant for payment, and the defendant (having been requested by the maker not to pay it) wrote upon it the words 'payment stopped,' and returned it to the presenter; and that afterwards, and before it came into the possession of the plaintiff, the words 'payment stopped' were erased from the face of the check, and an internal revenue stamp affixed over the same.

And it further appears as a distinct admission, that the check was taken by the plaintiff in the ordinary course of its business, on June 2, 1863; and that the plaintiff had no notice or knowledge of the circumstances under which the check was made, or of the equities affecting the same; or that 'payment stopped' had been written thereon, or

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erased, other than appeared upon the face of the check itself.

In order to make one a *bona fide* holder of commercial paper, he must receive it in the ordinary course of business, for value, and without any notice of facts tending to impeach the character or validity of the paper, as between the original parties.

That this check was received in the ordinary course of business is admitted, as I have stated. That it was received for value appears by the testimony of the teller, Mr. Brundage, who swears that when deposited by Vogt & Co. the plaintiff credited them with the amount; that after its receipt it was, in the course of business, after its passage through the clearing-house, returned by the runner of the Broadway Bank to the plaintiff, who paid the Broadway Bank the amount; that the plaintiff thereupon called upon their depositors to repay the same, which was refused, and thereupon this suit was brought.

At the time this suit was commenced therefor, the plaintiff had paid the full face of the check for the check; the plaintiff, for months after the commencement of this action, counted the check as cash, and charged it to the account of the depositors, and it now stands charged to their account; this latter fact, however, cannot be material in this action, because it is to be determined by me under the pleadings, upon the facts as they existed when the suit was commenced, and upon the law applicable thereto.

Even if the depositors are to be considered as having paid the plaintiff the amount of the check after suit brought, so that they became thereby the real parties (plaintiffs) in interest, the action still proceeds as if there had been no transfer of interest. (*Code*, § 121.) The plaintiff, therefore, having received the check in the usual course of business, and for value, it remains only to inquire, under the admission made upon the trial, and the evidence offered, whether sufficient appeared upon the

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face of the check to put it on inquiry in relation to its character or validity, as between the original parties. Upon this question I have before me the check itself, and the testimony of Mr. Brundage. Mr. Brundage says, when he received it on deposit it was comparatively clean, none of the blue marks upon it which now appear, and not torn as it is now, and stamped precisely as now. Mr. Brundage was the teller of the plaintiff, accustomed to receive and critically examine money, checks, &c., taken on deposit. And it is evident from his testimony that there was nothing about the appearance of the check which excited an inquiry on his part. He was not asked whether he noticed that the date of the check was some three months anterior to its being deposited. Whether he did or did not notice it is not perhaps material, but the defendant insists upon that fact as of great importance. I do not agree with him. I think, in this particular, a certified check is different from any other. It is considered by many holders in the light of a certificate of deposit. It is the obligation of the bank, and as such, often kept and held for long periods in the place of money. The lapse of time therefore was not, I think, calculated to attract any attention, or to put the plaintiff upon the alert as to the character of the check. The words 'payment stopped' had been written across one end of the face of the check, near the vignette, nowhere near the signature of the maker, or the certification by the bank. It had been carefully erased, and over it a revenue stamp had been pasted. A careful observer would perhaps have noticed that something had been erased, but what it was he could not tell. It was not any part of the check itself, neither as to date or amount, or parties or certificate; the whole body of the check was perfect, the signatures correct, the certificate of the defendant full and clear upon the face, and that, of itself, would be sufficient to withdraw attention from the appearance of the erasure. So

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far as I can judge, there was nothing about it calculated to excite attention, much less suspicion.

It appears, also, that a suit had been commenced upon this check in the marine court before the plaintiff had received it, but the plaintiff knew nothing of that. The judge had written upon the back of it, very indistinctly, 'Plff. Ex. A.—H. A.' I think a lawyer would have known at once on looking at it that the check had been an exhibit in some suit, but I do not believe any one else would have guessed what the writing meant, or would have paid any attention to it. I am, therefore, of the opinion that there was not sufficient appearing upon the check itself to put the plaintiff upon inquiry as to its character; it is in law a holder for value, and I cannot doubt received it in entire good faith. I cannot see any force in the defendant's position that the erasure of the words 'payment stopped' was a forgery. The Broadway Bank had no legal right to put these words upon the check, and when it did so, and handed it back to the party presenting it, he had a legal right to erase them, and restore the check to the condition in which it was, thus leaving all parties to their legal right and remedies. The act of the payee and his indorser was a dishonest and dishonorable act, and helped them pass off the check upon innocent parties, but it was not forgery. Hard as this conclusion may be against the maker of the check, it is, in my judgment, unanswerable. He suffered the consequence of the rule which gives to *bona fide* holders of commercial paper the right to enforce its collection, and it leaves him to his remedy against the person who defrauded him."

The defendant excepted to the referee's conclusions of fact and of law, and appealed from the judgment.

Samuel Brown, for the appellant. I. On the evidence that the defendant canceled its obligation on the check, "as was the custom;" and that the obligation of the defend-

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ant was subsequently renewed by the fraud of Burnham, and the check put in circulation by him, it became the duty of the plaintiff to show that it was a *bona fide* purchaser for value. (*Edwards on Bills*, 319.) (1.) The plaintiff did not attempt to show that Voght & Co. ever drew upon the check, or that the plaintiff ever paid them any thing on account of it. (2.) But it appears that the plaintiff was not a purchaser for value, and that it parted with nothing on the faith of the check. That it received it on deposit for collection, entering it as cash in anticipation of its payment, but finding it was repudiated by the defendant, returned it to its depositors, and demanded their check to cancel the credit, and, failing to obtain Voght & Co.'s check, it erased the credit by charging the check to them. (3.) The crediting Voght & Co. with the amount of the check on the books of the bank, was not, as stated by the referee, parting with value. (*Payne v. Outler*, 13 *Wend.* 605.) The credit was obtained either through mutual mistake, or by fraud on the part of Voght & Co. In either case it was the duty of the plaintiff to cancel the credit on discovering the fact, and charge the check (as they did subsequently) back to its depositors. This was decided in the case of *The Fulton Bank v. The Phoenix Bank*, (1 *Hall's Rep.* 562. *Garland v. Salem Bank*, 9 *Mass.* 408. *Peterson v. The Union National Bank*, 52 *Penn. R.* 206.) (4.) The repayment to the defendant was only returning to it the amount it had been improperly charged with in the clearing-house, and was of itself an admission on the part of the plaintiff that it had no claim against the defendant upon the check. (5.) The teller had no right to credit the check as cash; but the credit remained idle, Voght & Co.'s account being good for the check after it had been returned by the defendant. If any money was ever advanced by the plaintiff on the check, of which there is no proof, it was advanced after notice from the defendant, and with full knowledge

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of the character of the check. (*West v. American Exchange Bank*, 44 Barb. 176. *McBride v. Farmers' Bank*, 26 N. Y. Rep. 450. *Stalker v. McDonald*, 6 Hill, 93.)

II. The plaintiff had sufficient notice from the appearance of the check itself to put it upon inquiry before receiving it from its depositors, and is, therefore, chargeable with full notice of the equities, because: (1.) The check was four months past due. (*Gough v. Staats*, 13 Wend. 549. *Losee v. Dunkin*, 7 John. R. 70.) (2.) It bore marks of alteration in the traces of the erasure of the words "payment stopped" appearing on each end of the revenue stamp. (3.) The revenue stamp was affixed in an unusual and improper place on the check. (4.) The word "pay" was erased from the check, a most material alteration, and the body of the check was not perfect. (5.) It was indorsed in the handwriting of Judge Hearne, "Plff's Ex. A.—H. A." In *Wiggin v. Bush*, (12 John. 310,) a note was dated "24th May," and indorsed "22d Apl." It was held that the mem. "22d Apl." was sufficient to put the purchaser upon inquiry. In *Brown v. Taber*, (5 Wend. 567,) the note had a mem. on the back made by the clerk of the bank. That was held to be sufficient notice. In *Powler v. Prantly*, (14 Peters' R. 318,) the figures 169 appeared in pencil-mark on the face of the note. Held sufficient notice. (*Approved*, *Goodwin v. Simonson*, 20 How. S. C. 352, 465, 6.) In *Olaflin v. Farmers and Citizens' Bank*, (25 N. Y. Rep. 293,) the check was certified by the drawer as president of the defendants. Held, notice. In the case now before the court, more suspicious marks and memoranda appear on the face of the instrument than are to be found upon any or all the instruments referred to in the reported cases. When the defect or infirmity appears on the face of the instrument, the question is one for the court to determine, from the appearance of the check itself. (*Birdsall v. Russell*, 29 N. Y. Rep. 220.)

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III. The erasure of the words "payment stopped," whereby the defendant had canceled its certification while the check was in the hands of Burnham, was a material alteration of the instrument, by which means a renewal of the liability on the part of the defendant was sought to be created, and amounted to an actual forgery of the certification. The plaintiff could derive no title to the check, nor hold the defendant on such a certification. (2 *Parsons on Bills and Notes*, 583. *Brown &c. v. Westcott*, 3 Barb. 374. *Talbot v. Bank of Rochester*, 1 Hill, 295.)

C. A. Arthur, for the respondent. Upon the statement of facts agreed upon between the parties, the only question to be determined upon the trial was, whether the plaintiff was a *bona fide* holder of the check, without notice of the equities existing between the maker of the check and the payee.

I. The proof shows the plaintiff to be such *bona fide* holder. (1.) It is admitted that the check was taken by the plaintiff, in the ordinary course of business, on the second day of June, 1863, and that the plaintiff had no notice or knowledge of the circumstances under which the check was made, or of any equities affecting the same, or that payment had ever been stopped, other than appeared upon the face of the check itself. (2.) When the check was received by the plaintiff there was nothing upon its face to put the plaintiff upon inquiry, in relation to its character or validity, as between the original parties. Mr. Brundage, the teller, says that when he received the check for deposit, it was comparatively clean, none of the blue marks upon it, and not torn as when produced at the trial, and stamped as it was then. The referee had the check before him—it being offered in evidence upon this point—and he found that there was nothing upon the check itself to put the plaintiff upon inquiry as to its character,

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and that it could not be doubted that the plaintiff received it in entire good faith. The referee describes the check as it was when produced before him at the trial. The court will not interfere with this finding of fact of the referee, as to the condition and appearance of the check at the time the plaintiff received it. There was nothing to put the plaintiff on inquiry in the fact that the date of the check was some three months anterior to its being received by the plaintiff. It was a *certified* check, which being considered in the light of a certificate of deposit; as the obligation of the bank, is often kept and held for long periods, in the place of money. The *bona fide* purchaser of commercial paper is not bound upon his peril, to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. "He does not owe to the party who puts negotiable paper afloat, the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." (*Per Curiam*, in *Magee v. Badger et al.*, 34 N. Y. Rep. 249. *Steinhart v. Boker*, 34 Barb. 436. *Goodman v. Simons*, 20 How. U. S. 323. *Murray v. Lardner*, 2 Wall. U. S. 110.) (3.) That the check was received *for value*, appears by the testimony of the teller, Mr. Brundage. And see opinion of the referee.

II. The drawer of the check could not stop payment after the check had been certified, and the defendant had thereby accepted and bound itself to pay it. The acceptor of a check cannot repudiate its contract to pay, on the ground of any failure of consideration, or other equitable defense existing in favor of the drawer, as against the payee. The undertaking of the defendant, the Broadway Bank, was with the *bona fide* holder of the check, whoever he might be. The certification was equivalent to *payment*, so far as the drawer was concerned, and the endeavor of

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the defendant to deface the paper, by putting the words "payment stopped" upon the check when presented, after such certification, is indefensible, without legal right or authority, and the party presenting the check had a legal right to erase these words and restore the check to the condition in which it was. (*Clafin v. The Farmers and Citizens' Bank*, 25 N. Y. Rep. 300. *Meads v. The Merchants' Bank of Albany*, Id. 143.)

By the Court, GEORGE G. BARNARD, J. The plaintiffs were holders for value. It was so found by the referee, and the testimony clearly bears him out in his conclusion. His opinion covers every point raised, and does not require any additional views.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerks, Cardoso, and Geo. G. Barnard, Justices.*]

JONAS P. LEVY vs. MITCHELL HART, trustee &c., and others.

By the terms of a trust deed the grantor professed to create a trust in the property conveyed, for the benefit of his wife and five minor children. The instrument required the trustee to collect and receive the moneys, proceeds and income arising from any disposition that might be made of the premises and property granted and sold, and to invest the same in good and safe interest-paying securities, and to collect and receive the interest and income arising therefrom, and also, in his discretion, the principal, and for that purpose to dispose of such securities as he should think best, whether from interest or principal, again to invest and to reinvest, in his discretion; and out of the moneys or income arising from the property granted and sold, or the proceeds thereof, to pay the expenses of executing and carrying out the trust and a reasonable compensation to him for his services as trustee; and to apply the balance of the said income, and the principal, so far as in his judgment might be required, to the support and maintenance of the grantor's wife and children. And on the arrival of the youngest of said children then living, at the age of twenty-one years, or upon the decease of M. and A., the two youngest children, should they die before that time, to convey to

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the children then living, and to the grantor's wife, or to such of them as should survive, and the descendants of any such of them as might be dead, the said property then remaining in trust, in equal shares and proportions; the descendants of the deceased child to take the share their parent, if alive, would have taken.

Held that the effect of the language used in the deed was, that the trust should continue until the grantor's youngest child then living should attain twenty-one years of age, in case that age was reached within the lifetime of M. and A. That if it should be, then the trustee must convey to the grantor's wife and children, even if all of them should at that time be living. That if that age should not be attained while M. and A. were living, then at their decease he must convey, if every one of the surviving children at that time should continue to be minors.

That there could be no possibility, therefore, of the estate of the trustee extending beyond the duration of the two designated lives; and it was not within the prohibition of the statute relating to future estates in lands, or the statute relating to the suspension of the ownership of personal property. Both those statutes allow the title to be suspended for two lives in being and ascertained when the deed is made; and no greater suspension was provided for in this case. *Per* DANIELS, J.

If a trust is void, as suspending the power of alienation, and the absolute ownership of the property conveyed, beyond the period of two lives in being when the trust was created, the grantor of the trust cannot maintain an action in equity to set aside the trust deed on the ground that such is its legal character. If it be void, it cannot be even a cloud upon the grantor's title; because, if void upon its face, it cannot by any possibility be productive of injury to him, or his estate, and therefore will furnish no ground authorizing a court of equity to remove it, as likely to prejudice the grantor, or his estate.

The grantor in a trust deed, as the legal owner of the property conveyed, has no right to maintain an action to obtain a construction of the deed. That privilege is confined to the trustee, or those claiming under the trust and requiring its execution.

A PPEAL from a judgment entered at a special term, on a trial before Justice DANIELS, without a jury.

This action was brought by the plaintiff, the grantor, against the defendant Mitchell Hart, trustee, and the other defendants, the beneficiaries thereunder, to set aside and vacate a deed of trust made on the 19th day of July, 1865. This deed purported to convey, and did convey the interest of the plaintiff of, in and to, the real and personal property of which Uriah P. Levy died seised, as one of the

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heirs at law and next of kin to said deceased, to said Mitchell Hart, as trustee, "absolutely forever, in trust nevertheless, and to and for the uses, interests and purposes" stated therein, and as follows:

First. To take possession of, rent, demise, sell, convey and generally absolutely to dispose of the said lands and real estate, and ask, demand, sue for, collect and receive the said moneys, choses in action and other property, and the proceeds thereof, including the proceeds arising from any sale or other distribution of the share of the said parties of the first part in any real estate which was of the said Uriah P. Levy, deceased, as to which actual partition shall not be made or which the court shall decree to be sold, in order that distribution be had out of the proceeds.

Second. To collect and receive the moneys, proceeds and income arising from any disposition that may be made of the premises and property hereby granted and sold, and invest the same in good and safe interest-paying securities, and to collect and receive the interest and income arising therefrom, and also in his discretion the principal, and for that purpose to dispose of such securities as he shall think best, and the avails of such securities, whether from interest or principal, again to invest and to reinvest in his discretion.

Third. Out of the moneys or income arising from the property hereby granted and sold, or the proceeds thereof, to pay the expenses of executing and carrying out this trust and a reasonable compensation to him, said party of the second part, for his services as trustee.

Fourth. To apply the balance of the said income and the principal, so far as in his judgment may be required, to the support and maintenance of the said Fanny, and to the support and maintenance and education of the infant children of the said parties of the first part—named Isabella, Jefferson, Louis, Mitchell and Amelia Levy.

Fifth. On the arrival of the youngest of said children

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then living at the age of twenty-one years, or upon the decease of the said Mitchell and Amelia, the two youngest children, should they die before that time, to convey to the said children then living and to the said Fanny, or to such of them as survive, and the descendants of any child that may be dead, the said property then remaining in trust, in equal shares and proportions, the descendants of the deceased child to take the share their parents, if alive, would have taken."

The plaintiff alleged in his complaint that at and before the execution of said deed by him, he resided at the city of Wilmington, in the State of North Carolina, at which place he executed said deed; that he was induced to and did make said deed in consequence of, under and by the suggestions, statements, inducements and pretenses made to him by the defendant Fanny his wife, and her aiders, advisers and abettors, and upon which the plaintiff relied; that the said property was about to be, or would be, confiscated by the government of the United States. That the said State of North Carolina was, at the time of the execution of said deed by the plaintiff, in a state of rebellion to, and at war with the government of the United States, and was one of the seceding states, and *de facto* one of the Confederate States of America, so-called. That before the preparation of the said deed by his counsel, he, the plaintiff, instructed him to make said deed revocable, and to insert the name of Henry Hart therein as the trustee thereunder. That said deed was executed by the plaintiff, at the date thereof, in the State of North Carolina, of which state the plaintiff had been and was from the year 1861, and was up to about the month of February, 1866, a resident, citizen and freeholder; that on or about the month of February, 1866, this plaintiff came to the city of New York. That upon his arrival in said city, he was advised by his counsel that his acknowledgment of said deed, which had been previously made and taken in the

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said State of North Carolina, was not valid or effectual, whereupon, and on the 28th day of February, 1866, he acknowledged said deed before an officer in the city of New York. That at the time of such re-acknowledgment of said deed, the plaintiff did not read or examine the same, nor was said deed in his possession or read to him, nor did he know that Mitchell Hart's name was inserted therein as trustee; nor did he know that said deed by its terms was irrevocable, but to the contrary thereof supposed said deed to be revocable, and that Henry Hart's name appeared as trustee therein. That the name of Mitchell Hart was inserted therein without the consent, knowledge or authority of the plaintiff. And he, the plaintiff, was not aware, and did not know of said change of trustees until in or about the month of July, 1866, when, upon a subsequent visit to the city of New York, said plaintiff was informed thereof by the defendant Mitchell Hart.

The plaintiff further, upon information and belief, alleged that all and every the pretense, suggestion, inducement and statement, so as aforesaid made to him by said defendant Fanny, her aiders and abettors, were without foundation, force or effect, and were false, fraudulent and untrue, and were so made to induce him to execute said deed for the benefit of said Fanny and the other the said defendants, and to the exclusion of the plaintiff from all interest he had or might derive from said property so conveyed by said deed, and from all and every control thereof. That the entire estate, real and personal or mixed, covered by said deed, and granted, conveyed or transferred thereby, amounted in the aggregate to about the sum of \$50,000, of which said defendant Hart as such trustee had become possessed of about \$43,000 before the commencement of this action. And the plaintiff further stated that he was informed, advised and believed, and therefore alleged, that the said deed, and each and every

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the provisions, accumulations, and trusts, raised and created thereby, is and are without legal validity or effect, and is and are of no force, validity or effect as against the plaintiff, and as to him that the said deed, the various provisions thereof, the accumulations and trusts, and each and every of them created thereby were absolutely void and of no effect, as being contrary to, and against the form of the statute in such case made and provided, and that the intentions of the plaintiff as expressed in said deed and the various provisions thereof cannot, for that reason, be carried out or enforced. That by the terms, tenor, effect, true intent and meaning of the said deed, the absolute power of alienation and absolute ownership of the property mentioned and described therein is suspended for a longer period than during the continuance of not more than two lives in being at the creation of the estate therein, that is to say, the date of said deed, against, and contrary to the form of the statute in such case made and provided; and the trusts and provisions of said deed creating and suspending such power of alienation and absolute ownership of said property contained in the fourth and fifth paragraphs of said deed, are absolutely void and of no effect. That by the terms, tenor, effect, true intent and meaning of the provisions of said deed, and particularly of the second, fourth and fifth paragraphs thereof, an accumulation of the issues and profits of real property, and the interest of money and the income and profits of personal property, is directed for a longer period and for the benefit of persons not authorized to receive the benefit of such accumulation contrary to, and against the form of the statute in such case made and provided—such directions, so as aforesaid made, includes amongst the beneficiaries thereunder, an adult, the said defendant Fanny, as well as one or more minors, and is for that cause absolutely void and of no effect as against the plaintiff, and that the beneficiaries thereunder acquire no right or interest

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under such direction or the accumulation directed thereby. That the remainder and remainders over, provided for in and by the terms of said deed beyond the persons named as beneficiaries thereunder, are absolutely void and of no effect; that the estate thereby limited, that is to say, such remainder and remainders are contingent and depend upon, and are not separable from, the trusts and accumulations created and directed by the provisions of said deed, and cannot for that cause take effect, and fail. And that the property which purports to be conveyed under and subject to the trusts, accumulations and estates created and directed thereby, did not by the terms of said deed pass out of the plaintiff, or vest in any or either of the persons named in said deed, either as trustee or beneficiary thereunder. And the said property remains in and is vested in in the plaintiff as the absolute owner thereof, free and clear of the trusts, accumulations and estates created thereby. And that the plaintiff is entitled to the immediate possession thereof. Whereupon the plaintiff demanded judgment against the said defendants, that the said deed, and each and every the trust and trusts, perpetuity and perpetuities, remainder and remainders, estate, limitation, suspension, accumulation and contingency created or attempted to be created thereby, be ordered and adjudged by this court to be void and of no effect as against the plaintiff, and that he be adjudged to be vested with the title to, and to be the owner of all and every the property, real and personal or mixed, described in said deed, and conveyed or intended to be conveyed thereby, free and absolved from all and every trust, accumulation, limitation, perpetuity, contingency, suspension, claim or estate, interest or charge created therein or thereupon by reason of the provisions of said deed. And that the defendant Mitchell Hart, as such trustee, be ordered and adjudged to account to the plaintiff for such of the proceeds and income of said property, and said property so described

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as may have come to his hands, possession, or under his control; and the disposition, if any, by him made thereof, and generally his proceedings in the premises. And that this court would, by an order to be made for that purpose, enjoin and restrain the defendant Tillotson as referee, and the defendant Virginia Ree as administratrix, from paying over, delivering to, assigning, conveying or in any manner transferring to said defendant Mitchell Hart, as such trustee or assignee of the plaintiff, any property real or personal, of what name or description soever, now being and remaining in their or either of their hands as such referee or administratrix, of which the plaintiff at any time became seised, or to which he became entitled as one of the heirs at law and next of kin of Uriah P. Levy, deceased, or the distributive shares of the plaintiff in the proceeds arising from the sale by said referee of the real estate then lately of the said Uriah P. Levy, deceased, heretofore adjudged by this court to be paid to said defendant Mitchell Hart, as such trustee, until the determination of this action, or the further order of this court. And that said defendant Mitchell Hart might, by an order of this court, be enjoined and restrained from exercising the trust, or any trust or power, or pretended trust or power, created or attempted to be created by the terms and provisions of said deed; or from demanding, collecting or receiving from any person or persons, and from in any manner interfering with the estate, property, real or personal, distributive share or shares, income, proceeds or other interest attempted to be conveyed and transferred by, or described and included, or intended to be included, in the provisions of said deed, until the determination of this action, or the further order of this court. And that the said deed might be adjudged to be reformed and made revocable at the will of the plaintiff, and that said defendant Hart might be adjudged to surrender the trusts, property, estate, interest and rights by him acquired, under and by virtue

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of the provisions of said deed, and his appointment as such trustee, be adjudged void and of no effect, and revoked. And for general relief.

The defendants answered, admitting the making and execution of the deed of trust, but denying most of the allegations in the complaint; especially denying that any or either of the provisions, accumulations or trusts raised or created by said deed, is or are without legal validity or effect, or is or are of no force, validity or effect as to the plaintiff; or that as to him the said deed, or the various provisions thereof, or the accumulations and trusts, or either or any of them, are void or of no effect, or that any or either of them are contrary to the statute in such case made and provided, or that the intentions of the plaintiff, as expressed in said deed and the various provisions thereof, cannot be carried out or enforced, &c.

The justice before whom the action was tried found, as matters of fact: 1. That on the 19th day of July, A. D., 1865, the plaintiff and his wife, the defendant Fanny Levy, duly executed to the defendant Mitchell Hart the trust deed in the complaint set forth.

2. The plaintiff and his said wife, the defendant Fanny Levy, had then living their five infant children, respectively named: Isabella, then of the age of 15 years and over; Jefferson, then of the age of 13 years and over; Louis, then of the age of 12 years and over; Mitchell, then of the age of 9 years and over; Amelia, then of the age of 7 years and over. All of whom are now living, and neither of whom has attained the age of 21 years, and that said defendant Fanny Levy was then of the age of 37 years and over, and is yet living.

3. That at the time of the execution of the said deed, the plaintiff's said wife and the said children were the beneficiaries provided for by it; the plaintiff was entitled, as one of the heirs at law and next of kin of Uriah P. Levy, deceased, to a distributive share of one-seventh in

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the real and personal estate of said Uriah P. Levy, subject to the right of dower of his widow, which was conveyed in and by said deed to the defendant Mitchell Hart. That a portion of such realty has come into the hands of the defendant Gouverneur Tillotson, as referee in the action for partition referred to in the said deed, and a portion of the personalty into the hands of the defendant Virginia Ree, administratrix &c. of the said Uriah P. Levy, deceased. And that a portion of the personalty and the proceeds of a part of the real estate of said Uriah P. Levy, deceased, have come into the hands of the defendant Mitchell Hart as trustee.

4. That none of the representations or inducements to the plaintiff to execute the said deed, alleged in the complaint, were proven.

5. That, as appeared before him, the said deed was in nowise altered after it was executed, nor was it executed through any mistake or ignorance on the part of the plaintiff, nor prepared otherwise than as the plaintiff had directed.

And as conclusions of law upon the foregoing facts, the justice found: 1st. That the said deed did not suspend the power of alienation beyond two lives in being at the time of its execution.

2d. That the said deed did not unlawfully provide for an accumulation of the income.

3d. That the said deed was valid, and its provisions should be carried into effect.

4th. That the property, which was the subject matter of the said deed, passed out of the plaintiff upon the execution and delivery thereof, and became vested in the defendant Mitchell Hart, upon the trusts therein specified and thereby created.

5th. That the plaintiff was not entitled to recover in this action against the defendants.

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And that judgment should be entered in favor of the defendants against the plaintiff, with costs to be adjusted.

The following opinion was given by the justice, at special term:

DANIELS, J. "The plaintiff in this action insists that a trust deed, executed and delivered by him to the defendant, purporting to convey real estate, and to transfer personal property to the defendant, is inoperative and void on account of certain of its provisions contravening the prohibitions of the statutes relating to future estates in lands and the absolute ownership of personal property. By the terms of the deed the grantor professed to create a trust in the property conveyed for the benefit of his wife and five minor children. This trust, it is claimed, is void as suspending the power of alienation and the absolute ownership of the real and personal property beyond the period of two lives in being when the deed was delivered. And if such is its character, it necessarily follows, as the plaintiff claims in his complaint, that it is void, and as such conveyed no title or interest whatever to the defendant. Assuming that to be its legal character, it might properly be asked, here, what right that confers upon the plaintiff to maintain an action in equity concerning it. As such it cannot be even a cloud upon his title, because, if void upon its face, it can by no possibility be productive of injury to him or his estate, and for that reason will furnish no ground authorizing a court of equity to remove it, as likely to prejudice the plaintiff or his estate. (*Cox v. Clift*, 2 Comst. 118. *Scott v. Onderdonk*, 14 N. Y. Rep. 9. *Heyward v. City of Buffalo*, Id. 534.) And to obtain its construction, merely, the plaintiff as the legal owner of the property has no right to maintain the action. That privilege is confined to the trustee, or those claiming under the trust and requiring its execution, and it is not broad enough to include the party claiming as owner, and who

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may properly protect himself at law. (*Bowers v. Smith*, 10 *Paige*, 193. *Post v. Hover*, 33 *N. Y. Rep.* 593, 602.) Instead, however, of dismissing the complaint on this ground, as could without any equitable impropriety be done, the question already stated, and which was argued with so much zeal and ability at the trial, will be examined and disposed of the same as though no obstacle to the equitable jurisdiction of the court stood in the way. For that may possibly lead to a useful abridgement of the litigation into which the members of the plaintiff's family have unfortunately become involved.

The trust which it is declared the plaintiff intended to create by the deed in controversy, requires the defendant Hart to collect and receive the moneys, proceeds and income arising from any disposition that may be made of the premises and property 'granted and sold, and invest the same in good and safe interest-paying securities, and to collect and receive the interest and income arising therefrom. And also, in his discretion, the principal, and for that purpose to dispose of such securities as he shall think best, whether from interest or principal, again to invest and to reinvest, in his discretion;' and out of the moneys or income arising from the property granted and sold, or the proceeds thereof, to pay the expenses of executing and carrying out this trust, and a reasonable compensation to him for his services as trustee, and to apply the balance of the said income and the principal, so far as in his judgment may be required, to the support and maintenance of the grantor's wife and children. And on the arrival of the youngest of said children then living at the age of twenty-one years, or upon the decease of said Mitchell and Amelia, the two youngest children, should they die before that time, to convey to the said children then living, and to the said Fanny, 'his wife,' or to such of them as survive, and the descendants of any such of them as may be dead, the said property then remaining in trust, in equal shares and

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proportions, the descendants of the deceased child to take the share their parent, if alive, would have taken.'

These are the only provisions contained in this deed bearing upon the point whether the limitation placed upon the trust can extend its duration beyond two lives in being when the deed was delivered. It is claimed that it has that effect, because its continuance is required by the language of the deed, until the youngest of the children living at that time shall attain the age of twenty-one years; and if this was the fair construction and import of that language, such would undoubtedly be its effect; but the grantor in the deed immediately adds a qualification or restriction upon these terms of such a nature as to prevent the continuance of the trustee's estate beyond the lifetime of his two children, Mitchell and Amelia, then living. For, after declaring that the trustee shall convey the estate when the youngest child living shall arrive at the age of twenty-one, he adds that it shall be done upon the decease of Mitchell and Amelia, if they should die before that time. This could not have been added for any other purpose than to limit the estate of the trustee in such a manner that it could not extend beyond two lives, namely, those of Mitchell and Amelia. No other object could have been within the plaintiff's intention when he made the deed; for this clause in no manner tends to define or explain the language previously used. Indeed that required no definition or explanation whatever, for its import was clear and unmistakable. Its only office was to impose a legal limitation of what, without it, would have rendered the trust unlawful. And as such, it does not permit the trust to be extended or continued beyond the duration of the two lives mentioned. The law will not allow the duration of a trust to be continued until one person, of a class consisting of more than two, attains a certain age or dies, because he may neither attain a certain age nor die until every one of the others may have

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died, which would, if valid, have the effect of extending the trust beyond the duration of two lives, and this the statute prohibits. But to declare the continuance of a trust until one of that class shall attain a certain age, provided he does so before the death of two individuals ascertained and designated, cannot by any possibility have that effect. For it is then impossible to extend the trust beyond the lives of those two persons, and that, very obviously, is all the grantor intended or endeavored to do by this deed. The effect of the language used is, that the trust shall continue until his youngest child then living attains twenty-one years of age, in case that age is reached within the lifetime of Mitchell and Amelia. If it should be, then the trustee must convey to the plaintiff's wife and children, even if all of them should at that time be living. If that age shall not be attained while Mitchell and Amelia are living, then at their decease he must convey, if every one of the surviving children at that time continue to be minors. There can be no possibility, therefore, of the estate of the trustee extending beyond the duration of the two designated lives, and it is not within the prohibition of the statutes relating to future estates in lands or the suspension of the ownership of personal property. Both those statutes allow the title to be suspended for two lives in being and ascertained when the deed is made, and no greater suspension has been provided for in this case.

The second clause in the deed makes use of terms from which it might fairly be implied that the trustee was expected to accumulate the income of the property without limiting the accumulation upon the minority of the infants, or providing it for their benefit. But this is by no means made imperative on the trustee. A discretionary power only is given to him, which is very clearly controlled by the following clauses in the deed, showing that no accumulation was expected to arise under it. These clauses direct that out of the moneys or income arising

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from the property, or the proceeds of it, the expenses of the trust and a reasonable compensation to the trustee should first be paid; and after defraying those, the trustee is directed to apply the balance of the said income and the principal, so far as in his judgment may be required, to the support and maintenance of the wife and family of the grantor. The liberty given to the trustee to resort to the principal of the estate in the event that he may deem the expenditure of a part of that required for the suitable support and maintenance of the family, is a very clear indication that the grantor did not anticipate that any accumulation would be made out of the profits or income. And under that state of the case the deed cannot be said to provide for an unlawful accumulation of the income; but even if it did, the direction only, and not the deed itself, would be void.

The result of this examination of the deed is, that the defendants are entitled to a judgment dismissing the complaint in the action, with costs."

Judgment being entered accordingly, the plaintiff appealed to the general term.

Samuel J. Crooks, for the appellant. The questions involved in this appeal are more immediately connected with the terms of the deed. It is found by the judge who tried this action at special term, that one of the beneficiaries under the deed (*Mrs. Levy*) was an adult at the time of the execution of the deed, and that neither of the minor children had attained their majority, nor had said minors or either of them attained majority at the time of the commencement of this action. The property covered by the deed, and conveyed thereby, consisted mainly of real estate situated in the city of New York. The avails of the sale of the same in partition and by the judgment of this court, are mostly in the hands of the trustee; a small balance still remaining in the hands of

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the referee, the defendant Gouverneur Tillotson, Esq. For the purpose of this action, the question whether the property conveyed was real or personal, can make no material difference in the final determination of the action. All the allegations material to a determination of the appeal, upon the principal questions involved, are conceded by the judge who tried the case. The appeal presents the following questions for review by this court, that is to say: 1. Do the trusts created by the terms of said deed suspend the absolute powers of alienation and absolute ownership of the property mentioned and described therein, for a longer period than that authorized by statute; that is to say, for a longer period than during the continuance of not more than two lives in being at the date of the deed, *i. e.*, creation of the estate?

2. Does the deed, by its terms above cited, direct an accumulation of the issues and profits of real property and the interest of money, and the income and profits of personal property for a longer period, and for the benefit of persons not authorized to receive the same, against the form of the statute in such case made and provided?

If either of these questions should be answered in the affirmative, then,

3. Does the remainder over, contingent upon the trust and accumulation authorized and directed by the terms of said deed, take effect or fail, and the property revert, or more properly, remain in the grantor, relieved of the estates, trusts and limitations attempted to be created by said deed?

Before proceeding to state the law governing the case the plaintiff submits, it may be quite proper to presume that the scheme of the deed is this: 1st. That the income of the estate, real and personal, conveyed by the deed, should be invested in good and safe interest-paying securities, and the interest and income arising therefrom, and the principal, (if collected,) was again to be

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invested and reinvested, in the discretion of the trustee, (grantee,) after payment of the expenses of executing and carrying out the trust.

2d. That then the balance of such income, and the principal, so far as in the judgment of said trustee might be required, was to be applied to the support and maintenance of the defendant Fanny Levy, and the support, maintenance and education of the infant children of the said grantor (plaintiff) and the said Fanny, five in number.

The property was all to be kept together until the arrival of the youngest of said children then living at the age of twenty-one years, or until the decease of the two youngest children, (therein named as Mitchell and Amelia,) should they die before that time; the said property then remaining in trust was to be conveyed by said trustee to such of said children as should then be living, and the said Fanny, or to such of them as survived, and the descendants of any child that might be dead, in equal shares and proportions.

It will be seen, and is admitted, that the entire property in controversy, (say \$50,000,) except about \$4000, consisted of real estate, at the time of the execution and delivery of the deed, and so continues for the purposes of this action, and as to all the parties thereto. (3 *Selden*, 242.) "A demise of real estate to executor with power to sell, but without directing a sale, does not effect a conversion of the real into personal estate." (*Id.*)

I. The question of the right of the plaintiff (grantor) to maintain this action was first raised in this case by the judge (Daniels) in his opinion. Although the learned judge expresses a doubt as to such right, he does not dismiss this action for that cause, and as there is no finding disposing of this case upon that ground, the question is wholly on this court. If the question were before this court, it is submitted that the case is widely different in

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character from those cited by the learned judge in support of his opinion.

II. "The provisions of the statute controlling the trusts created, and accumulations directed by this deed, and as to real property, are as follows: (3 R. S. 5th ed. page 16, § 55, sub. 3:) "Express trusts may be created for any or either of the following purposes: To receive the rents and profits of lands and to apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title." "An accumulation of rents and profits of real estate for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real estate, as follows: If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being and terminate with their minority." * * (3 R. S. 5th ed. p. 13, § 37, sub. 1.) The same statute by part of section 38, provides that "all directions for the accumulation of rents and profits of real estate, except such as are herein allowed, shall be void." And by section 15, (3 R. S. 5th ed. p. 11,) "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate:" * * And as to personal property, the provisions are as follows: (3 R. S. 5th ed. p. 75, § 3, sub. 1,) "An accumulation of the interest of money, the produce of stock, or other increase or profits arising from personal property, may be directed by any instrument sufficient in law to pass such personal property, as follows: If the accumulation be directed to commence from the date of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the

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expiration of their minority." * * By section 1 (3 *R. S. 5th ed. p. 75*) it is provided, that "The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition." * * It is believed to be well settled that there is no limitation upon the creation of a trust estate, in and as to personal property, either as to persons or the continuance thereof, except as to the duration of such estate as provided in section 1 (3 *R. S. 5th ed. p. 75*) above cited. In any view of the provisions of this deed, whether the property conveyed be real or personal, can make no difference in the result to be arrived at, if the views entertained by the plaintiff are correct.

III. The trusts created by the terms of the deed as herein recited are absolutely void. If of real estate, as suspending the power of alienation for a longer period than the continuance of not more than two lives in being at the date of the deed. If of personal property, as suspending the absolute ownership of such property for a like period. "The power of alienation cannot be suspended for a longer period than during the continuance of not more than *two lives* in being at the creation of the estate; and every limitation by which the power of alienation *may* be suspended for a longer period is void in its creation. The lives must be *designated*, either by naming two persons in particular, or by limiting the estate on the *first two lives which shall fall* in a class of several individuals. If the last two lives are taken, it is obvious that the suspense will continue for as many lives as there are persons in the class." (*Hawley v. James*, 16 *Wend.* 172, *Bronson, J.*) "Life must in some form enter into the limitation, so that the power of alienation can *in no event* be suspended beyond two designated lives. No absolute term, however short, can be maintained." (*Per Bronson, J., in Hawley v. James*, 16 *Wend.* 64;

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and see decree entered in above case at p. 274.) The ruling of Bronson, J., as above, has received the approval and been followed by the courts since. (See opinion of Gridley, J., in *Jennings v. Jennings*, 7 N. Y. Rep. 547; *Kane v. Gott*, 7 Paige, 521; S. C., 24 Wend. 641; *Boynton v. Hoyt*, 1 Denio, 53; *Morgan v. Masterton*, 4 Sandf. 442.) By this rule it will be seen that the power of alienation was suspended in the case at bar, or which is the same thing, might be suspended, during *six lives*. Suppose the three eldest of the five children living at the date of the deed should die, and the remaining children should arrive at the age of twenty-one years. It is clear that by the terms of the deed the estate must be kept together, and the power of alienation must be suspended during five lives, and for six if the wife Fanny be included. It is apparent that the conveyancer in drafting this deed had in view the rules as adopted in the foregoing cases, so far as the same required the lives to be *designated* by name, but overlooked the important fact that "*in a class of several individuals*" the rule required that such designation should be of the "*first two lives that fall*." In the case at bar, the lives designated are those of the two youngest children in a class of several. If these children live, the estate as to all continues until the youngest of the two attains majority; but if the three eldest children die, the estate does not cease; although the statute has been more than satisfied in the lives of *three*. The fault is that this deed designates the two lives least likely to fall, and in doing so falls into the error which the statute was designed to remedy. The mere designation of two persons by name, upon whose lives the estate depends or during which it is to continue, is not necessarily a compliance with the statute. The lives thus designated by name, if selected from a number of individuals, (constituting a class,) beneficiaries under the same deed, may be selected in such a manner as to continue the estate for any number of lives preceding those

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selected. Such is the case in the present instance. The rule as to designating the lives clearly means (where there is a class of persons named as beneficiaries), that the continuance of the estate shall be made to depend upon the *first two lives that fall*. "The rule is the same whatever may be the description of the property to which it is applied. It is a settled law that to render a limitation void, which if sustained would create a perpetuity, it is sufficient that the event upon which it depends *may happen*; and here the event is not only probable, but almost certain to happen." (See *opinion of Duer, J., in Andrews v. N. Y. Bible and Prayer Book Society*, 4 Sandf. 56.) In another view, the limitation if sustained would create a perpetuity. The estate is virtually limited upon minorities. The children may all live and all attain majority. If so, the estate continues during five lives at least, by the terms of the deed. The limitation is in the disjunctive, and is until the youngest of the children attains twenty-one years, or the two youngest die, if they shall die before the youngest of the two attain majority. Clearly the event upon which the limitation depends may happen in the case as last stated. If so, the limitation is void. A limitation upon minorities is virtually a limitation upon lives. (10 Barb. 300.) It will be noticed that the limitation upon or time during which the trust is to continue, is until "the arrival of the youngest of said children then living at the age of twenty-one years, or until the decease of the said Mitchell and Amelia, the two youngest children, should they die before that time." This limitation does not in any sense confine or bound the continuance of the trust estate by life; on the contrary, the *utmost limit* for the continuance of the estate is fixed for the period when the youngest child arrives at the age of twenty-one years. That this event *may happen* is clear; if so the estate is limited upon an *absolute or certain term*, and cannot be supported. The *utmost limit* for the continuance of the estate must be bounded by life, or the

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estate will be void in its creation. (*Hawley v. James*, before cited. *Boynnton v. Hoyt*, 1 *Denio*, 58.)

IV. The direction in the deed for the accumulation of the trust estate, whether of real or personal property, for the benefit of an *adult* as well as minors, is void. (16 *Wend.* 61. *Harris v. Clark*, 7 *N. Y. Rep.* 242; and see *statutes above cited*.) A void trust for the accumulation of the income of property invalidates the conveyance of the principal, when the direction for such accumulation involves an illegal suspension of the alienation of real and absolute ownership of personal property. (15 *N. Y. Rep.* 322. See 7 *id.* above cited.)

V. The remainder over is limited upon an uncertain event, and is therefore contingent, and falls with the trust term. "Future estates are contingent while the person to whom, or the event upon which, they are limited to take effect remain uncertain." (3 *B. S.* 5th ed. p. 11, § 13.) The limitation in favor of the defendant Fanny the wife, and such of the children as survive and the descendants of those who do not, is a contingent remainder which from the terms of its creation cannot take effect, if at all, until the expiration of the trust term. By the terms of the deed, the trustee is directed to convey to such persons as last aforesaid; the said property then remaining "in trust, in equal shares and proportions, the descendants of any child to take the share their parent, if alive, would have taken." Such conveyance to be made upon the happening of the contingency, or in the event "of the arrival of the youngest of said children then living at the age of twenty-one years, or the death of Mitchell and Amelia, the two youngest children, should they die before that time." Clearly the event and the person to whom the remainder in this case is limited are uncertain. (See 4 *Sandf.* 442.) The doctrine as to what constitutes an illegal limitation rendering the estate void as suspending the power of alienation and absolute ownership of property, will be found

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thoroughly discussed in the cases of *Yates v. Yates*, (9 Barb. 346, 347, by Wright, J.;) *Levy v. Levy*, (33 N. Y. Rep. 128, &c.;) *Rose v. Rose*, (Court of Appeals, Sept. 1864;) *Dodys v. Pond*, (23 N. Y. Rep. 69;) *Leonard v. Burr*, (18 id. 96;) *Bascom v. Albertson*, (34 id. 608, &c., by Porter, J.;) and also in the case of *Beekman v. Bonsor*, (23 id. 314, &c.) The decisions in all these cases lead to the same conclusion as that arrived at by Mr. Justice Bronson in the case of *Hawley v. James*; and although the courts have at times insisted upon a perversion of the plain letter of the statute, to enforce some peculiar crochet, yet it is submitted that in no case have the court departed from the letter of the statutes, when a satisfactory arrangement of the estate could be safely left in the hands of the ultimate owner, as in this case. The court will not bend the statute for the purpose of depriving a grantor and father, as in this case, of the ultimate disposition of his property, or the making a suitable settlement for his family. The law has clothed the head of a family with this right, of which courts have not attempted to deprive him or her.

Clarkson N. Potter, for the respondents.

By the Court, GEO. G. BARNARD, J. This case was properly disposed of at special term. The opinion of Justice DANIELS fully meets all of the objections of counsel.

The judgment is right, and should be affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clark*, *Cardozo* and *Geo. G. Barnard*, Justices.]

HENRY DWIGHT, JUN., *vs.* THE NORTHERN INDIANA RAILROAD COMPANY and others.

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Upon a reference to ascertain what, if any, damages defendants have sustained in consequence of an injunction, it is the duty of the party claiming to have sustained damages, to establish the fact, and the amount, by satisfactory proof.

If he fails to do so, and the referee, upon the evidence, finds that no damages have been sustained, his report will not be disturbed, on exceptions.

THIS is an appeal by the defendants Cammann, Wilson & Fuller, and Azariah Boody, from an order made at special term, upon exceptions, to the report of the referee, to whom it was referred to inquire and report whether any, and if so, what damages had been sustained by Boody, or the defendants, by reason of the injunction granted in the cause.

The gravamen of the complaint was that, on the ninth day of March, 1854, the plaintiff gave to the defendant, the Northern Indiana Railroad Company, a promissory note for \$30,373.65, with interest, payable April 1, 1855, indorsed by the Chicago & Mississippi Railroad Company, and with it delivered, as a collateral security, five hundred and seven shares of the capital stock of the said Chicago and Mississippi Railroad Company; that the note, among other things, was given upon an usurious contract; that the defendants Cammann & Co. were the holders of the said note, and had served on the Chicago and Mississippi Railroad Company a notice that they would sell the collateral security on the 27th of April, 1855, in pursuance of its hypothecation.

The referee reported, *First*. That on the 26th day of April, 1855, the plaintiff obtained from one of the justices of this court an injunction order, restraining the defendants, and each of them, from selling, assigning, transferring, parting with or in any manner meddling or interfering with 507 shares of the capital stock of the Chicago and Mississippi Railroad Company, which were transferred and

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delivered by the plaintiff to the defendant Edwin C. Litchfield, treasurer of the Northern Indiana Railroad Company, as collateral security for a promissory note made by the plaintiff for \$30,372.29 and interest.

Second. That on said 26th day of April, 1855, when the said injunction order was granted, the promissory note mentioned therein, and the said 507 shares of stock collateral thereto, were held by the defendants Cammann, Wilson & Fuller, composing the firm of Cammann & Co., of New York, for the account of said Azariah Boody; but that the said note and the said stock collateral thereto did not belong to said Cammann & Co., but that the same then belonged to, and were the property of said Azariah Boody.

Third. That when said injunction was granted, the said Boody was not in the United States, but in Europe. That he went abroad in February, 1855, and returned to this country in May, 1855. That the said Boody was not a party to this action, and was not served with said injunction.

Fourth. That said Cammann & Co., while so holding said note and stock, were served with said injunction, and that the same was in force and operation from the said 26th day of April, 1855, when it was granted, until the 30th day of November or the 1st day of December, 1855, when it was dissolved.

Fifth. That default having been made in the payment of said note, the said Cammann & Co., in pursuance of the authority therein contained, gave notice to the plaintiff that they would, on the 27th day of April, 1855, sell the said stock at the Merchants' Exchange, by Albert H. Nicolay, auctioneer.

Sixth. That on the morning of the 27th day of April, 1855, said Nicolay was served with said injunction, and that in consequence thereof he refrained from selling or attempting to sell said stock.

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Seventh. That from the evidence which had been produced before the referee, he was wholly unable to determine or decide whether or not the stock of the said Chicago and Mississippi Railroad Company, at the time of the granting of said injunction order, or afterwards, had any intrinsic or actual value.

Eighth. That from the same evidence it appears that the said stock had no market value in the city of New York at the time of the issuing of said injunction or during the operation thereof.

Ninth. That said evidence fails to show, in any distinct legal or satisfactory manner, the amount of damages, if any, which the said Cammann & Co. or the said Boody sustained by reason of the said injunction, and leaves the question whether there were any, and if any, what damages wholly speculative and conjectural.

Lastly. That in his opinion it was incumbent on Messrs. Cammann & Co. and Mr. Boody to show affirmatively and by adequate legal evidence, (1.) That damages had been sustained by means of the injunction. (2.) The amount of such damages. That although it was quite probable that the operation of the injunction was detrimental, he was not at liberty to proceed upon surmise or conjecture. Upon the evidence as presented, he found and did accordingly report that neither Messrs. Cammann & Co. nor Mr. Boody had sustained any damage by reason of the said injunction.

Boody excepted to the report; the exceptions were disallowed and the report confirmed, and Boody appealed to the general term.

Wm. Tracy, for the appellant.

Wm. W. McFarland, for the respondents.

In the matter of Forman's will.

By the Court, GEO. G. BARNARD, J. I think the findings and report of the referee were correct. The plaintiffs obtained an injunction against the railroad company and others, to prevent them from selling, or attempting to sell, certain stock. That injunction was afterwards dissolved. The matter was then referred to a referee to ascertain what, if any, damages they had sustained in consequence of its issuance. He held there were none. In looking over the testimony, I am satisfied he was right. It was the duty of the defendants to show what damages they had sustained. They failed to do so, and consequently the referee rendered a proper judgment.

The order disallowing exceptions to the referee's report should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 7, 1869, *Clerks, Cardoso and Geo. G. Barnard, Justices.*]

In the matter of the probate of two papers propounded as the last will and testament of ANNA MARIA FORMAN, deceased.

The general rule is that two or more written instruments, executed at the same time, relating to the same subject matter, by the same party, or between the same parties, should be construed together, and viewed as one instrument.

Two written instruments, executed by the same person, at the same time, may, notwithstanding their repugnancy in certain particulars, or in certain respects, constitute a will, or the will of such person, and legally and properly be admitted to probate as such.

The point or question of repugnancy or inconsistency in the provisions of the two instruments may be a subject or question for consideration, after the probate of the will, when the two instruments come to be carried into effect, or claimed or acted under, as a will, but does not arise, and cannot properly be considered, in the probate proceedings.

Where one of the attesting witnesses to a will testified that the testatrix told her, in the room where and when the same was executed, before signature, that the paper or papers constituting the same was or were her will; and the

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other witness swore that although the testatrix did not say, while she was in the room, where and when the papers were executed, that they were her will; yet, that when the testatrix came to the kitchen to call her as a witness, she told her that she wanted her to witness her will; *Held* that this evidence, together with proof that the testatrix signed the instruments in the presence of the two witnesses, and that they signed their names as witnesses in her presence, and in the presence of each other, was sufficient to show that they were executed and attested in the manner required by the statute. What is sufficient proof of the testamentary capacity of a testator at the time the will was executed and attested.

The words "*mind and memory*," as used in our statute relating to wills of personal property, and as used at common law, are and were convertible terms. The question, in respect to testamentary capacity, in the abstract, is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make a will; that is, to do the thing or act authorized by the statutes; but practically, in most cases, the question is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make the will in question. The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe. A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects, and not as to others.

Moral insanity is a disorder of the feelings and propensities, and may or may not impair the intellect. Legal insanity is a disorder of the intellect.

Moral insanity, not proceeding from or accompanied by insane delusion, the legal test of insanity, is insufficient to set aside a will.

Where it appeared from the evidence that at the time a will was executed the testatrix despised, distrusted and hated her husband, and probably feared him, and it was a fair inference from the evidence that these feelings towards her husband caused her to execute the will in question; and there was no doubt that she intended thereby to prevent him from getting any more of her estate than was given to him by such will; *Held* that in testing the testamentary capacity of the testatrix, the question was not whether these feelings towards her husband, at the time, &c., were unreasonable, excessive or unjustifiable merely, or even whether they amounted to, or showed, moral insanity as to her husband; but was whether these feelings were insane—whether the contempt, distrust, hatred and fear, which she had of and for him, at the time, was *insane* contempt, *insane* distrust, *insane* hatred, *insane* fear; or, in other words, the contempt, the distrust, the hatred, the fear of an insane wife towards her husband.

And, the preliminary proofs showing that the testatrix, at the time when, &c., was competent or had testamentary capacity to execute the will; and that her feelings towards her husband caused her to execute the instrument as and for her will, and influenced her dispositions of property by it; *Held, further*, that it was for the contestants satisfactorily to show that these feelings towards her husband came from, or originated in, or at least were ac-

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accompanied by, delusion as to her husband, his character, conduct, motives or condition.

And the proofs not showing that the testatrix's contempt for her husband, her distrust, fear and hatred of him, when she executed the will, came from, or originated in, or were accompanied by, delusion *as to her husband*, his character, conduct, motives or condition; it was *held* that the testatrix, at the time she executed the will, must be deemed to have had testamentary capacity, and was competent to execute the instrument as her will.

Where a testatrix, at the time she tore up and destroyed a will previously executed by her, was, though not permanently insane, in a condition and laboring under an excitement, which, under the circumstances, incapacitated her for forming or having a reasonable or intelligent intention of revocation; *Held* that such act was not to be regarded as a revocation of the will.

THIS is an appeal from a decree of the surrogate of the county of New York, admitting to probate two papers propounded as the last will and testament of Ann Maria Forman.

The instruments were first admitted to probate on the 8th of June, 1867. From this decree Mr. Forman, the husband of the testatrix, appealed to the Supreme Court, which, at the general term, in November, 1867, reversed the decree of the surrogate, and then remitted the case to the surrogate, directing that the testimony already taken should stand, with liberty to either party to introduce new evidence. The general term, in making this decree, held that the two papers were too inconsistent to constitute one will, and said "The surrogate should find which of the two instruments, if either, is the will. If he cannot determine that, the case on the part of the proponents fails for want of proof." On their second appearance before the surrogate the proponents failed to show which of the two instruments, if either, was the will, and on the 25th of March, 1868, the surrogate made the same decree as before. The instruments were dated February 27th, 1862. The deceased died, insane, on the 27th of February, 1865, leaving a husband and half sister, her only next of kin and heir-at-law, and letters of administration were issued to the husband, the present appellant, April 9th, 1865.

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The entire estate, amounting to some \$150,000, with the exception of \$1000 given to the husband, is given, by the instruments propounded, to persons other than the husband and next of kin and heir-at-law.

Enos B. Forman, the husband, appealed from the decision of the surrogate, on the ground that the execution of the alleged will was not duly proved, and that the deceased was not of a sound and disposing mind at the time of the alleged execution of the will, and that the two papers, being inconsistent, cannot be the last will.

As the two papers admitted to probate were torn to pieces by the alleged testatrix, August 31st, 1864, under circumstances that amounted to a revocation if she were sane at the time, the decree of the surrogate was necessarily a finding that she was at that time insane.

The evidence was claimed to be clear and conclusive that for the last two years of her life she was insane; the witnesses even for the proponent generally conceding that the deceased was insane in March, 1863.

Henry A. Cram, for the appellant. I. The decedent was of unsound mind, and had not a *disposing mind* at the time of the preparing and execution of the pretended will. *Proofs of insanity*: Her physical condition and symptoms of a character tending to produce and accompanying insanity. Her capricious conduct, credulity, confusion of ideas, forgetfulness. The complete change, without cause, in her feelings to her husband. The contradictory character of her wills. The delusions under which she labored amounted to unsoundness of mind, such as her delusions about the war; as, for instance, that there was no war, no armies, no battles. The Prince of Wales—her opinion, before the war began, that he was to be king. Her delusions as to her food being poisoned; the danger she was in from chloroform, &c. Her insane delusions about various papers she had executed. Her delusions as to her

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husband; as to his conduct in relation to her property; that he did not give her money enough; that he did not love her; that he wanted to poison her; that he was trying to do it; that her life was in danger from him; that he would put something in her food; poison her with chloroform; was in league with the cook and servants to bring this about; that the servants were trying to poison her; her insane actions and conduct, and occupation; as on the occasion of her being invited to her uncle's funeral; the flags, banners, kites and stones she had in the house; the bells and papers on her doors before she executed these wills; her tin armor; her experiments with the cat; her conduct in reference to the war. She took her views, she pretended, from the *Caucasian* and *Daily News*, and spent her time in getting the flags hung out everywhere, and having her kites flown with patriotic banners attached; and the war did not go on vigorously enough to suit her; and the various other instances detailed by the witnesses. But throwing out of view all the varied evidences of insanity, and taking one single symptom, and that as presented by the witnesses of both sides, and applying to it the strictest and most correct legal test of insanity, the will must be set aside as not her act. The case, by all the witnesses, shows that Mrs. Forman was laboring under several grave delusions as to her husband. Now, take but the single instance of her notion that her life was in danger from him, proved by all the witnesses—her senseless dread of chloroform and poison clearly proved to have existed at the time of the execution of these papers. That they were delusions, even the hostile witnesses had to admit. That there were no reasonable grounds for these notions, nothing that would have induced even a much weaker woman than Mrs. Forman to have entertained them, the case shows. These delusions were so powerful that Mrs. Forman carried them into action, locking her door against her husband, and never admitting

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him to her room, a fact undisputed, thus fulfilling Lord Brougham's extremely strict definition, "incapacity to struggle against delusions constitutes unsoundness of mind." The same argument is applicable as to all the other delusions of Mrs. Forman about her husband, in relation to her property, his conduct, his affection, &c. Mrs. Forman, as to her husband, was clearly unsound and a monomaniac, if there be such a thing as monomania, as distinguished from general unsoundness. Now, although the more than doubtful proposition may be conceded, that the acts of a person laboring under such delusions may be valid in matters outside of, and not connected with, the subject of the delusion, yet never will it be permitted that a person dealing with the very subject matter of her delusions, and carrying them out into action, is as to such action sound, and such action valid and her act. "If the mind is unsound on one subject, provided that unsoundness is at all times existing, it is erroneous to suppose such a man really sound on other subjects." (*Lord Brougham*, 12 *Jurist*, 947. *Frere v. Peacocke*, 1 *Rob.* 442. *Thomas v. Thomas*, 12 *Jurist*, 947. *Grove v. Thomas*, 2 *Hagg.* 433. *Dew v. Clark*, 3 *Add.* 79. *Hopper Will Case*, 33 *N. Y. Rep.* 624; *S. C.*, 43 *Barb.* 625, *opinion of Leonard, J.* *Thompson v. Thompson*, 21 *id.* 114, *dissenting opin. of Judge Clerke.* *Stanton v. Wetherwax*, 16 *id.* 259.) Denio, in *Hopper Will Case*, (33 *N. Y. Rep.* 624,) says: "Setting aside cases of dementia, or loss of mind and intellect, the true test of insanity is mental delusion. If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad or insane on these subjects, though on other subjects he may reason, act and speak like a sensible man. (*Dew v. Clark*,

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3 *Add. Ecc. R.* 79.) If the deceased in the present case was unconsciously laboring under a delusion, as thus defined, in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty when he executed his will, or when he dictated it, (if he did dictate it,) and the court can see that its dispositive provisions were, or might have been caused or affected by the delusion, the instrument is not his will, and cannot be supported as such in a court of justice."

II. While there is no difficulty in admitting to probate different papers executed at different times as one will, it is submitted that never before have two contradictory papers simultaneously executed been admitted to probate; there is no authority for it; it is against every principle. Both of these papers are not, cannot be, the last will of Mrs. Forman; and neither can be admitted to probate, the evidence in favor of each being equally strong, so that the court cannot determine in favor of either. It is a case of failure of proof. It is a dilemma that no sane person ever before produced or ever will produce. It is a dilemma to which there is no solution, excepting it is to be treated as it should be, as the strongest evidence of insanity, and then the dilemma no longer exists.

III. It was not sufficiently proven that these papers were executed in the manner prescribed by the statute for the due execution of a will. The great preponderance of the evidence, and the most reliable part of it, shows that they were not. Although Mrs. Westervelt testifies that what the law prescribes was done at the time of the execution, when she and the other subscribing witness were in the room with the decedent, her testimony is not entitled to the same consideration as if given by a wholly disinterested witness, which she is not, because in each paper she is named as a residuary legatee; and although precluded from taking any thing under the papers, if admitted to probate, the fact of her being a legatee goes to her cred-

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ibility. But this is not all; her testimony is replete with contradictions of herself, and she is contradicted by several witnesses on both sides, showing that besides having a very poor memory, she swears thoughtlessly, carelessly and recklessly; while Maria Smith, the other subscribing witness, who was examined at great length in reference to various matters, is supported in every essential particular by witnesses on both sides, and by Mrs. Westervelt herself, except in reference to what occurred when the papers were executed. Maria swears that while she was in the room with the decedent and Mrs. Westervelt, when the papers were executed, and in their presence, nothing was said in respect to the papers by Mrs. Forman or any one, or in regard to any thing save her (Maria's) writing after she had signed one of the papers; that Mrs. Forman did not at that time declare the papers, or either of them, to be her will, and did not ask her or Mrs. Westervelt, or both, to become subscribing witnesses; that when Mrs. Forman came down to the kitchen and asked her to go up and sign her name to a paper or papers, which paper or papers Mrs. Forman there told her was her will, Mrs. Westervelt was not present.

IV. "This is evidently a case that should have been submitted to a jury, who understand the secret motives of people of their own kind better than we do, who are engaged in the profession." (From the very able argument of counsel for the proponent in the court below.) See opinion of Sutherland, J., in *Hopper Will Case*, (43 Barb. 625.)

V. The Supreme Court decided that both papers could not be admitted to probate, they being too inconsistent to constitute one will. After taking the testimony of the two subscribing witnesses, which the proponents offered with the purpose of determining which paper was last executed, and on all the testimony, it being impossible to determine that one paper was executed after the other, the

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surrogate has seen fit wholly to disregard the decision of this court, and has a second time admitted both papers to probate, repeating exactly his first decree. This defiance of the appellate jurisdiction concerns this court more than counsel, but this court is bound by its previous decree; it is *res adjudicata*. This case being here now under exactly the same circumstances as before, this court must, therefore, as before, reverse the second decree of the surrogate.

VI. It would be a mockery and a denial of justice for this court again to send this case back to the surrogate. The result of such a course would only be a new decree of the same kind. This assertion is made on the best authority.

VII. An examination of the additional testimony taken before the surrogate since the case was sent back, and also of the original testimony, will show that it is impossible to show which paper was last executed. The only possible testimony on this subject is that of the two subscribing witnesses; they both have sworn that they could not tell which was first executed; and while one of them pretends that she can now tell which was last executed, an examination of her testimony shows that she does not know and cannot tell, and that on this point she is utterly unreliable and unworthy of all credit.

VIII. The evidence shows that both papers were in fact and in intendment of law executed at the same instant, and neither before the other.

IX. The two papers are so inconsistent that they both cannot be admitted to probate; this is *res adjudicata*. (*Humphrey v. Humphrey*, 2 *Curties' Ecol. Rep.* 468. *Pleny v. West*, 1 *Rob.* 261.)

X. The additional examination of Mrs. Westervelt taken by the proponents since the case was sent back, now shows that the will was not executed according to the statute, confirming in this respect the evidence of the other sub-

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scribing witness, who expressly proved that the will was not so executed. As the case now stands, the proof of due execution entirely fails. (8 *Paige*, 502.)

XI. This court has power to dispose of the case without awarding a feigned issue, and without sending it back again to the surrogate for any action by him. This court takes the place and has the powers not only of the late circuit judge, but also of the late Court of Chancery, in respect to appeals of this character. The late Court of Chancery, by virtue of its general jurisdiction, had and frequently exercised authority on appeal, to declare a paper valid or invalid as a will, and to adjudge that it be admitted to or refused probate. This question was fully considered, and was adjudicated in *Pilling v. Pilliny*, (45 *Barb.* 86,) and see also *Stewart's Executors v. Lispenard*, (26 *Wend.* 320 ;) *Brinckerhoof v. Remsen*, (8 *Paige*, 502 ;) *Chaffee v. Baptist Mission Con.*, (10 *id.* 85 ;) *Mead v. Mead*, (11 *Barb.* 661 ;) *Mason v. Jones*, (2 *Bradf.* 181 ;) *Whitbeck v. Patterson*, (22 *Barb.* 84 ;) *Schenck v. Dart*, (22 *N. Y. Rep.* 420 ;) *Clapp v. Fullerton*, (34 *id.* 195.) All the evidence which exists on the subject having been produced, and it being obvious that it is impossible to determine which, if either, of the two papers is the last will of Mrs. Forman, it would be a great expense and injustice to the appellant for this court to compel him to go back again before the surrogate, there to find a further denial of his rights, and the authority of this court again disregarded. It is insisted, therefore, that this court should reverse the decree of the surrogate, and make a final decree declaring that neither of the two papers is the last will of Mrs. Forman, and neither can be admitted to probate.

Thomas Nelson, for the respondent Rebecca S. Haviland.

A. A. Redfield and *E. Pierrepont*, for the other respondents.

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By the Court, SUTHERLAND, J. The contestants do not contend that the two written instruments, dated the 27th day of February, 1862, were executed under restraint or undue influence. There is no pretense that they were.

The questions, then, presented by the appeal, are four :

1st. Could these two instruments, notwithstanding their repugnancy in certain particulars, or in certain respects, constitute a will, or *the* will of the deceased, and legally and properly be admitted to probate as such ?

2d. If they could, were the two instruments executed and attested in the manner required by the statute ?

3d. If they could constitute, and be admitted to probate as a will, or as one will or instrument, and were executed and attested in due form, had the deceased testamentary capacity when they were executed and attested ?

4th. If the preceding questions are decided in the affirmative, the remaining question presented by the appeal is: Should the tearing up of the two instruments by the deceased, on or about the 31st day of August, 1864, under the circumstances, and considering what was said and done at the time, be regarded as a revocation of them, viewing them as constituting one will or instrument ?

As to the first question, I am the more willing to say that I think the general term erred in deciding it, when the case was here before, because that impromptu decision was made upon, and probably in consequence of, my suggestion. Further consideration of the question does not permit me to doubt that the point or question of repugnancy or inconsistency in the provisions of the two instruments did not arise, and could not properly be considered, in the probate proceeding; that the two instruments, if executed and attested at the *same time*, could constitute a will, and might properly be admitted to probate as such, notwithstanding their repugnancy in certain

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particulars; that the question or point of repugnancy might or would be a subject for consideration, after the probate of the will, when the two instruments came to be carried into effect, or claimed or acted under, as a will.

The general rule is, that two or more written instruments, executed at the same time, relating to the same subject matter, by the same party, or between the same parties, should be construed together, and viewed as one instrument.

I see no reason for making these two instruments an exception to this rule. The repugnancy could not prevent or affect its application to them. The proofs, when the case was here before, were clear and conclusive that the two instruments were executed and attested at the same time; and, if possible, this point is made clearer by the additional evidence before us now.

I do not think that the former impromptu decision of this question, when the case was here before, should, under the circumstances, be regarded as *res adjudicata*.

As to the second question, whether the two instruments were executed and attested in the manner required by the statute, I am clearly of the opinion that the proofs show that they were; and that the surrogate was right in holding and decreeing that they were.

Mrs. Westervelt, one of the two witnesses to the will, swears clearly and positively on this point. She swears that Mrs. Forman told her, in the room, when and where the two papers were executed, before they were signed by Mrs. Forman or the witnesses, when she, Mrs. Forman and Maria Smith were together, that the paper or papers was or were her will. Maria Smith, the other witness, swears that Mrs. Forman did not say, while she was in the room with Mrs. Westervelt and Mrs. Forman, when and where the papers were executed, that the paper or papers was or were her will; but she admits when Mrs. Forman came to the kitchen to call her as a witness, that she then

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and there told her that she wanted her to witness her will. The inference, if Maria Smith was an honest and willing witness, is, that she had forgotten that Mrs. Forman called the paper or papers her will, in the room when and where they were executed and attested.

It is not disputed that the proofs show that the two papers were signed by Mrs. Forman in the presence of the two witnesses, and that they signed their names as witnesses in her presence and in the presence of each other.

3d. Had Mrs. Forman testamentary capacity *when* the two papers were executed and attested?

This is the great and interesting question in this very extraordinary case, and *the* question, to which nearly all of the evidence in the bulky volumes of printed evidence relates. The words "persons of non-sane memory," in the statute of Wills of Henry VIII, meant persons of *non-sane* or *unsound mind*. It was held in the *Marquis of Winchester's case*, (5th Coke,) that a person, to make a testamentary disposition of his lands, must have a memory sufficiently sane and perfect to do the act or thing authorized by the statute; that is, to make a testamentary disposition of his lands, with reason and understanding.

The words of our statute of wills as to real property are: "All persons except idiots, persons of unsound mind, &c., may devise," &c. (2 B. S. 56.) The words of our statute as to wills of personal property are: "Every male person, &c., of sound mind and memory, and no others, may give, bequeath," &c.

The words *mind and memory*, as used in this last statute, and as used at common law, are and were convertible terms. The use of the words mind and memory as convertible terms is not so unphilosophical as it might at first seem to be, for without memory there could be no mind, properly speaking. Without any memory, a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life.

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As the result of the reported cases relating to testamentary capacity, under our statutes, it may be said that the question of capacity, in the abstract, is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make a will; that is, to do the thing or act authorized by the statutes; but that practically, in most cases, the question is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make the will in question. (*See the Parish Will Case*, 25 *N. Y. Rep.* 9, &c.; *The Hopper Will Case*, 33 *id.* 619; *The Lispenard Will Case*, 26 *Wend.* 255; *Clark v. Fisher*, 1 *Paige*, 171; *Stanton v. Wetherwax*, 16 *Barb.* 259; *Thompson v. Thompson*, 21 *id.* 107.)

There is no pretense that Mrs. Forman, when the two papers were executed and attested, was an idiot, or in a state of fatuity. There is no pretense that she was then a raving maniac.

I think the proofs in this case furnish no reasonable ground for thinking or saying that she was *then* in a state of *dementia*—that she was then generally or absolutely insane on all subjects, or in relation to all persons.

The undisputed circumstances attending the execution of the two papers—her conversation at the time, as testified to by both the witnesses to the papers—her conversation with Mrs. Westervelt when she gave her one of the papers to keep—the preparation of the two papers—her evident and undisputed purpose in preparing and executing the two papers—her previously intelligently expressed intention of doing what she did do—show conclusively that *when* the two papers were executed Mrs. Forman was not generally or absolutely insane—that she was not *then* in the state or condition of *dementia*. I have read every word of the evidence in this case—portions of it more than once—and I think I may say that the proof of facts and circumstances relating to the conduct and conversations of Mrs. Forman, prior to and up to the time of her

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executing the two papers, do not show that she was not *then* ordinarily reasonable and intelligent on most subjects, and was not *then* intellectually able to take care of herself and of her affairs. The proofs furnish no pretense for saying that she was not competent to make a will, when she made the Reynolds will, in 1859, or the De Witt will, in August, 1861.

The proofs do not show any change in her conduct or conversation between the making of the De Witt will and her execution of the two papers in question, from which it would be reasonable to infer that she had become generally or absolutely insane, when the two papers in question were executed. Mrs. Westervelt, one of the witnesses to the two papers, swears that she did not suspect, when Mrs. Forman executed them, that she was of unsound mind. Maria Smith swears that she thought she was then of unsound mind. Other witnesses, including Mrs. Forman's husband, expressed the same opinion. Other witnesses expressed the opinion that she was then of perfectly sound mind. There probably never was a case where the bare expression of the opinions of witnesses, not experts, on such a question, was entitled to less weight. Most of them, pro and con, were and are deeply interested in the decision of the question, pecuniarily and otherwise. Mr. Forman, the husband, the prominent contestant, and perhaps the most important, prominent and industrious witness on that side, stood and stands with open hands, willing and eager to catch and take, use and enjoy, whatever the law will give him, as husband and next of kin, or either, of his poor wife's estate, if she is judicially declared to have been insane when she executed the two papers in question. I do not wish to be uncharitable to Mr. Forman, but I must say that his position in the case; his interest in the case; his industrious efforts to make out that his wife was insane, insane generally, insane absolutely; his unjustifiable conduct in forcing her into a pri-

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vate mad-house, as he did, with the aid of the police, without any legal proceeding, or legal adjudication as to her insanity, without advising with her friends and relations with whom she was most intimate, and without even the certificate of her physician, or of any physician; his keeping her there for six months without her seeing any of these friends and relations; his conduct in getting the papers from Mrs. Wright and Mrs. Westervelt and putting them into the hands of his wife in the asylum, when and where they were torn to pieces by her; and other circumstances to which it is not necessary to refer; should greatly impair, if not entirely destroy, the weight not only of any opinion of his, on the question of his wife's sanity or insanity, but also the faith and credit to be given to his evidence, as to facts and circumstances relating to her conduct and conversation, when, or where, his evidence is not supported by other evidence, or other circumstances.

As to Maria Smith, perhaps the next most prominent and industrious witness for the contestants, her evidence and her opinions are certainly greatly impeached by her continued servile relation to Mr. Forman, and her manner of testifying, so far as it can be inferred from reading her evidence.

No doctor or expert has, I believe, undertaken to testify that Mrs. Forman was insane when the two papers in question were executed, or at any time prior to their execution.

The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe. A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects, and not as to others. (*Dew v. Clark*, 3 *Addams' Eccl. Rep.* 79. *Frere v. Peacocke*, 1 *Rob. Eccl. Rep.* 442, 445. *Greenl. on Ev.* § 371, a. *Fulbeck v. Alison*, 3 *Hagg.* 527. *The Hopper Will Case*, 33 *N. Y. Rep.*, before cited. *Stanton v. Wetherwax*, 16 *Barb.*, before cited.)

Was Mrs. Forman, at the time she executed the two

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papers, *partially* insane? Or rather, to state at once the question in this case, *was she insane on the subject of her husband?*

Mrs. Forman's estate amounted to some \$150,000. She was married in 1851. In 1855 her father died. In 1855, after her father's death, she made a will by which she gave her husband the bulk of her estate. She made another will in 1859, by which she gave her husband less. In August, 1861, about six months before she executed the two papers in question, she made another will, by which she gave her husband still less. By the two papers in question she gives her husband a bare pittance of \$1000. She had no children or descendants. She had collateral relations, cousins, &c., and one half sister, Mrs. Haviland, her heir-at-law. She disliked Mrs. Haviland, and I believe she is not mentioned in the two papers, or in either of the wills. This dislike and exclusion of Mrs. Haviland from her wills is accounted for, without resorting to any theory of insanity, or of insane delusion.

There is no doubt, when the two papers in question were executed, that Mrs. Forman despised, distrusted and *hated* her husband, and I think *then* feared him. Certainly there is no doubt that soon after the execution of the two papers, and while she had one of them in her possession, in her room, or in the house, and up to the time she was forced to the asylum, she greatly feared him, and even the servants in the house, whom she thought he might control. It is a fair inference from the evidence, that *these feelings towards her husband* caused her to execute the two papers in question. There is no doubt that she intended, by them, to prevent her husband from getting any more of her estate, on her death, than he would get by them.

Now I think it must be conceded, as matter of law, if the evidence in the case satisfactorily shows that these feelings towards her husband, at the time she executed

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the two papers in question, proceeded from, or originated in, an insane delusion, then the evidence shows that she was not competent, or had not testamentary capacity to execute the two papers in question, as, or for, a will, or her will. The cases I have before cited are sufficient to show this, I think.

But it must be particularly noted that the question is not whether these feelings towards her husband, at the time, &c., were unreasonable, excessive or unjustifiable morally, or even whether they amounted to, or showed *moral* insanity as to her husband; but the question is, whether these feelings were insane—whether the contempt, distrust, hatred and fear, which she had of and for her husband, at the time of the execution of the two papers in question, was *insane* contempt, *insane* distrust, *insane* hatred, *insane* fear; or, in other words, the contempt, the distrust, the hatred, the fear, of an insane wife towards her husband.

I do not know that what is called *moral* insanity has a place in civil cases, and in civil courts. I do not know that, legitimately, and properly, it has a place in criminal cases, or in criminal courts.

I repeat, that by the reported cases, and by the books, delusion, hallucination, is the legal test of insanity. Moral insanity is a disorder of the feelings and propensities. Legal insanity is a disorder of the intellect. Dr. Prichard describes moral insanity as "consisting in a morbid perversion of the feelings, affections and active powers, without any illusion or erroneous conviction impressed upon the understanding." Moral insanity may, or may not, impair the intellect, or intellectual faculties. Moral insanity not proceeding from, or accompanied with, insane illusion, the legal test of insanity, is insufficient to set aside a will. (*Frere v. Peacocke*, 1 Rob. Ecol. R. and other cases before cited. 1 Jarman on Wills, 66. *Greenwood v. Green-*

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wood, 3 *Curtis' App.* III. *Boyd v. Eby*, 8 *Watts*, 72. *Prichard on Insanity in relation to Jurisprudence*, 16, 19, 30.)

The question of testamentary capacity, in this case, is, was Mrs. Forman, at the time she executed the two papers in question, legally insane as to her husband? Not, was she *then morally* insane as to her husband. The question of insanity as to her husband is not, were her feelings towards her husband, when, &c., unreasonable, unjustifiable or unusual, but is, were these feelings founded on, or did they proceed from, or originate in, delusion—*insane* delusion? I think these feelings account for all of her conduct and conversation reliably proved in this case, claimed by the contestants to show that she was insane as to her husband, when the two papers in question were executed. They account for her complaints of her husband. They account for her complaints that he did not render her accounts, or satisfactory accounts, of her property. If he did render them, these feelings towards her husband account for their not being satisfactory. But did he ever render her any accounts of her property, or of its income? I must confess I doubt whether he ever did. Not one was produced. He brought into court the round stones that she had picked up. He counted them, or had them carefully counted, so that he could say how many there were. He produced the banners, the kites, the tins, and the doggerel, or doggerels, about the "raids," or "duping raid;" but why, if he had from time to time rendered her these accounts, was not one of them produced? The fact that he ever gave her these accounts, or any account, is shown alone, I think, by his evidence. I have already made a remark, which I do not wish to repeat, as to the credit to be given to his evidence when it is unsupported by any other witness or circumstance.

The feelings of Mrs. Forman towards her husband, especially her fear of him and of the servants in the house whom she supposed under his influence, aggravated by

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her physical ailments; her loneliness and seclusion, after she and her husband occupied separate rooms; considering her education, character, and want of occupation, account for her conduct in and about her room, after such separation; for the bells on the doors; for her fear of chloroform; for her putting the slips of paper over the cracks; for her fear of being poisoned; for her conduct as to her food, not eating at the table, &c. Of course these feelings are sufficient to account for her request that she and her husband should occupy separate rooms and beds. But there is one of the witnesses—I think, Mrs. Westervelt—that hints that Mrs. Forman told her that there was another, or an additional, cause for this request, which either Mrs. Forman was not willing to plainly speak of, or the witness was not willing fully to disclose, and did not fully disclose.

These feelings towards her husband, especially her distrust of him, and of his motive in marrying her, account for her suspicions as to his having got her money out of the banks, and as to the real nature and effect of certain papers relating to property, which she had executed. Of course they account for her complaint that he married her for her money; that he did not pay her as much attention as he did the servants in the kitchen. But it is these feelings, this contempt for her husband, this distrust, hatred and fear of him, which is to be accounted for.

The proofs preliminarily showed that Mrs. Forman, at the time when, &c., was competent, or had testamentary capacity, to execute the two papers as a will. The proofs leave no room for doubt that her feelings towards her husband caused her to execute the two papers as or for her will, and influenced her dispositions of property by them.

It was for the contestants satisfactorily to show that these feelings towards her husband came from, or originated in, or at least were accompanied with, delusion as to her husband, his character, conduct, motives or condition.

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In my opinion the contestants did not show this. I go farther. In my opinion the proofs in this case do not furnish reasonable ground for suspecting that Mrs. Forman's contempt for her husband, her distrust, fear and hatred of him, when she executed the two papers, came from, or originated in, or were accompanied with, delusion *as to her husband*, his character, conduct, motives or condition. Mrs. Forman appears to have been the pet child of a kind and indulgent father. Her father was a respectable mechanic, who acquired considerable property by industry and economy. He educated this daughter at the most fashionable boarding schools. She married Mr. Forman in 1851, she being then about 43 years of age, and he about 48, after a most common-place and cool courtship of years. She probably married Mr. Forman at the suggestion or by the advice of her father; certainly without any enthusiastic love on either side. Her father died in 1855, but before his death had given her all his property. She made a will in 1855, after her father's death. Up to this time she and her husband appear to have got along very well together, *but they had no children*, and never had any. With less affection for her husband, she made another will, in 1859; with less affection for her husband she made another will, in 1861; with no affection for her husband, and with feelings of contempt, distrust, hatred and fear of, and for him, six months afterwards she executed the two papers in question.

From the proofs in this case, Mr. Forman appears to have been at the time of his marriage, and to have continued to be, a common-place, cool, complacent, calculating, circumspect man, without vices or virtues to excite or attract the attention of men or women; with little education, and with little means, and at the time of his marriage, and for some years afterwards, engaged in a business which, of all others, was least calculated to add to or expand the ideas that he had. After he left off

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business, in 1858, he appears to have had nothing to do but to attend to his wife's property, collect her rents, &c.

If the history which the proofs in this case give of this man, and his poor wife, who died in a private lunatic asylum, after being forced and kept there for nearly two years, without any adjudication of her insanity, (unless the *habeas corpus* proceedings, months after she was put there, involved such adjudication,) does not sufficiently account for Mrs. Forman's feelings towards her husband when the two papers were executed, without resorting, or the necessity of resorting, to any supposition or theory of insane delusion or hallucination as to her husband, his conduct, motives or character, *then these feelings are not accounted for by the proofs in this case.* These proofs do not show *that these feelings came from, or originated in, or were connected with,* any insane delusion *as to her husband,* or of which he, his character or conduct, was the subject. A wife may trust or fear her husband unreasonably, or love or hate him excessively, without being expected to give very satisfactory reasons for it. Mrs. Forman, on one or more occasions, was reminded of the apparent kind and affectionate attentions of her husband. She said, yes, "but a man could smile, and smile, and be a villain." I do not say that she did not mistake the character and designs of her husband. I do not say that he did intend to poison or chloroform her, to get her will or her property. I do not say that he was or is a villain. But I do say that the proofs in this case do not satisfactorily show that her fear and hatred of her husband came from insane delusions of or about him, his character or designs. A wife may fear and hate her husband excessively, without being crazy.

Mr. Forman never treated (I mean by acts) his wife as insane, until he took her to the asylum. He treated her as sane after she was there, by getting her to execute certain papers respecting her property. He ought not to be

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permitted to say that he did not treat her as sane by getting the two papers in question, and handing them to her in the asylum. No doctor certified to her insanity, until months after she had been in the asylum, and a stir had been made about her confinement.

There is much evidence which, the contestants claim, shows that she was insane on certain subjects other than her husband. She was greatly excited about our late war, or rebellion, and hence came the kites, the banners, the doggerel or doggerels about the *raid* or *raids*, her fears about the continuance of the government, and her talk about the Prince of Wales, and our having a king, &c. &c.

She had a passion for gathering round water-worn pebbles or stones from the sea shore, and other places, and hence came her collections of a great number of round stones, or pebbles. Her husband testifies to a conversation with her in the fall of 1860, or beginning of 1861, which, if it ever took place, would go to show that she was deluded, insanely deluded, about a Mr. Vail who had once worked for her father. He swears that she said she was going to put certain pieces of tin, which he found in a certain closet, over her heart, so that this Mr. Vail could not stab her; that she had once seen Vail at a store in Greenwich street, and she ran away as fast as she could. Now it seems that there was a Mr. Vail, who had worked for her father, and as there is no pretense for saying that she had any ground for fearing him, if she did say what her husband says she did, on this occasion, she must have been insanely deluded on this point. Three of the pieces of tin were produced before the surrogate and identified by her husband. Miss Denham had also seen the piece or pieces of tin in the closet, or in Mrs. Forman's possession; but she explains for what natural and useful purpose Mrs. Forman might have got and used them. I believe the evidence of Mr. Forman, as to the conversation about the pieces of tin, stands unsupported by any evidence or circumstances,

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except the fact that she had several pieces of tin, and three of them were produced and identified. I refer again to what has been said about the evidence of Mr. Forman as to the conduct and conversation of his wife, when it is unsupported.

Mr. Forman also testifies to a conversation with his wife in the winter or spring of 1861, in which she said that she was jealous of a Mrs. Denham, who, with her husband, had been dead many years, and that when told so, she said, "well, crazy people have got curious notions." I believe this evidence is unsupported by any other witness or circumstance, and I do not believe the conversation ever took place.

There is also some evidence as to Mrs. Forman's great attachment to a certain pigeon, and her eccentric way of trying to catch it in the street, on a Sunday, and I believe on one or two other occasions, in the street.

I have referred to the principal if not all of the subjects other than her husband, as to which it is, or might be, claimed that she was insane when the two papers in question were executed. There may be evidence of some other eccentric conduct or conversation, not connected with or relating to her husband or the two papers in question, or any of her testamentary dispositions of property, which I have not referred to.

You might concede that she was insane, morally or legally, or both, on these subjects other than her husband, without interfering with the conclusion that she had testamentary capacity, when the two papers were executed—testamentary capacity to execute the two papers as a will, or as her will.

A monomaniac, or a partially insane person, may make a will. A believer in witches and witchcraft, in spiritualism, or in the doctrines of Mahomet, may make a will. The proofs in this case do not show, or make it probable, if Mrs. Forman was insanely deluded on any or all of the

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subjects, other than her husband, which have been alluded to, that such insane delusion or delusions at all influenced her in preparing and executing the two papers in question, or in making the testamentary dispositions of her property intended to be made by them. Vail was not related to her, and it was not natural that she should think of him, in preparing and executing the papers. He had nothing to expect from her.

There is in these two papers a small legacy to David Coons, a cousin of hers, who, it seems, died in January preceding the execution of these papers in February. This is, I think, explained by the circumstances that the two papers were mostly copied from the De Witt will, and that that will contained a like legacy. David Coons lived in New Jersey, and it is quite probable that the two papers were prepared before she heard of David Coons' death.

My conclusion is, that Mrs. Forman, at the time she executed the two papers in question, had testamentary capacity; that she had then capacity, and was competent to execute them as her will.

The fourth and remaining question is, should the act of her tearing up the two papers, when handed to her by her husband, in the asylum, considered in connection with what she said, at the time, be regarded as a revocation of them as her will.

The counsel of all the parties have argued this case upon the theory that she was then insane and incapable of having or forming an intelligent and rational intention. I do not wish to disturb this concession, nor am I willing to concede that the evidence in this case shows that she was then permanently insane; but I think that the evidence does show that she was, when she tore up the papers, in a condition and laboring under an excitement, which, under the circumstances, incapacitated her for forming or having a reasonable or intelligent intention of revocation.

My conclusion upon the whole case is, that the decree of

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the surrogate admitting the two papers to probate as her will, should be affirmed, I have some hesitation in saying, with the costs of *all* parties to be paid out of the estate; but the circumstances of the case are very peculiar, and if my associates, who are to concur or non-concur in this opinion, think that the costs of *all* parties should be paid out of the estate, I am willing to say, with costs of all parties to be paid out of the estate.

Decree affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Geo. G. Barnard, Cardoso and Sutherland, Justices.*]

HENRY M. LOWENSTEIN, plaintiff in error, *vs.* THE PEOPLE,
defendants in error.

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The principle of the rule laid down in *The People v. Erwin*, (4 Denio, 129,) viz., that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the keeper of a bawdy house, applies to any person who is personally concerned in the keeping of such a house.

In misdemeanors there are no accessories; all who procure, counsel, aid or abet the commission of the crime are principals.

One who has the control of premises, and knowingly rents a building thereon for, and permits it to be used as, a house of prostitution, cannot screen himself from punishment by showing that he did not own the premises, but rented the same and collected the rents merely as agent for the owner.

THIS is a writ of error to the court of sessions of the county of Monroe. The defendant was tried, convicted, and sentenced by said court upon an indictment containing four counts. The first being for keeping a disorderly house; the second for keeping a gaming house; the third for keeping a bawdy house; the fourth for renting a house with the intent that the same should be kept for the purposes of prostitution.

Evidence was given by the people tending to show that

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the defendant was occasionally in the block, and that he received the rents for some of the rooms, and that the inmates of different rooms in the house were prostitutes. It was shown on the part of the defendant that he did not own the house, but the same belonged to his wife, in whom the title was, and that all he did was as her agent, in collecting the rents for her.

The prosecution having closed their evidence, the defendant's counsel made a motion to quash the last count in the indictment, which motion the court granted, and ordered the said count to be quashed, which was done. The defendant's counsel also moved that the prisoner be discharged on the ground that there was no sufficient evidence or proof to prove the charges laid in the indictment against him, and because there was not sufficient evidence to put the prisoner on his defense, or to go to the jury. But the court overruled the motion, and decided that there was sufficient evidence to put the defendant upon his defense, and to leave the case to the jury; and the counsel for the defendant excepted.

At the close of the case, the defendant's counsel again moved the court that the prisoner be discharged for the same reasons urged on the former motion, and also renewed such motion, and moved for the prisoner's discharge on the further ground that it now appeared affirmatively on the part of the defendant, that he was not the owner of the block or premises in question, designated in the indictment, or in any way interested therein; and that at the most he was a mere agent in the renting, and collecting of the rents, of the tenants who occupied the block in question, another person being at the same time the absolute and separate owner thereof; that there was not sufficient evidence to prove the charges laid in the indictment against the prisoner; and that there was not sufficient evidence to convict the defendant of the crime charged in the indictment; or that the court should direct the jury

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that there was not sufficient proof to justify a conviction, but that the indictment should be quashed on the ground of a total failure of proof. But the court overruled the motion, and decided that there was sufficient evidence to convict the defendant, if the same were believed to be true, and that the case should and must go to the jury; to which ruling and decision the defendant, by his counsel, excepted. The court then charged and directed the jury, among other things, that the defendant was liable to be indicted for keeping a bawdy or disorderly house, if he acted as agent only in renting the same, although he were not in fact the owner thereof, or in any way interested therein, and to be convicted merely as agent of the owner; to which charge and direction the defendant's counsel also excepted.

And thereupon the jury found the defendant guilty of keeping a disorderly house, as charged in the indictment.

M. S. Newton, for the plaintiff in error. I. The last count in the indictment was properly quashed, because it was the same in form as the indictment in the case of *The People v. Brockway*, (2 Hill, 558,) which was held to be bad, in that case, and also in the case of *The People v. Erwin*, (4 Denio, 129.)

II. The evidence did not show that the defendant rented any part of the block to any person, knowing such person to be one of lewd character; or that he rented any part of the block with the intent or knowing that it would be kept as a place of prostitution. This was a large block of buildings, consisting of many rooms, and it does not appear from the testimony that the defendant ever rented more than one set of rooms, and those to the man Samuel Ellison, and there was therefore no evidence to convict him of renting a house to be kept for the purpose of prostitution.

III. He was not the keeper of a house of ill fame, for

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he neither owned nor controlled, nor had the power to control, the house, so far as any thing appears from the evidence in the case.

IV. If the case of *The People v. Brockway* (2 Hill, 558) is good law, the conviction and charge of the court is wrong; and the charge of the court is wrong as applied to this case, even within the decision of *The People v. Erwin*, (4 Denio, 129.) For in the 2d of Hill, the defendant was held not liable who rented *his own* house for the purpose of being kept as a house of prostitution. And the case of *Irwin* only held that where the *owner* rents and permits his own house to be kept as a place of prostitution, the owner is liable, as principal, for aiding and abetting in a misdemeanor. The case of *Harrington* (3 Pick. 26) is to the same effect.

V. The defendant was neither owner nor had the power to control the block in question, and he could not be for this reason an abettor of the crime, as was held in the case of *Irwin*, who furnished the house.

VI. The court charged that the defendant was liable if he acted merely as an agent of the owner of the house. This cannot be so. 1st. For the renting of a house, like the selling of furniture, or the drawing of a lease, is an act innocent in itself. 2d. To make the act complained of criminal, it must be such as directly and immediately, if not necessarily, leads to the commission of the crime. (See the words of Justice Nelson in *The People v. Brockway*, 2 Hill, 561.) 3d. The owner of a house, who rented it to another to be kept as a house of ill fame, might be said to aid in the commission of the crime, because he furnished the house for the purpose; and he could suffer it to be carried on or he could stop it at any moment. But a mere agent, in collecting rent, or in renting one room, cannot be said to aid in the commission of the crime, within the principles of law as laid down in the case of *The People v. Brockway*, and other cases referred to. 4th. The mere

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agent in this case is one step further removed from the crime, and does not come within the definition of aiders and abettors. (*See opinion of Nelson in Brockway's case.*) 5th. If any one having any thing to do with the block or rooms were liable, a carpenter who worked repairing or fitting up the rooms, or a carman who carted the furniture to the rooms, or the scrivener who wrote the leases, would be liable, on the same principle, as aiders and abettors of the crime.

J. A. Stull, (dist. att'y,) for the people. I. This was the case of an indictment for a misdemeanor, (keeping a bawdy house.) In misdemeanors there are no accessories, but all parties having a criminal participation in the commission of the act are to be charged as principals. (*Barb. Crim. Law*, p. 286, 2d. ed.) An accessory before the fact, in a felony, is one who, not being present at the commission of the act, does yet procure, counsel, aid and abet the perpetrator in the commission of it. (1 *Hale*, 615. *Whart. Cr. Law*, § 34.) Therefore, if the defendant in any way aided, abetted, procured or counseled the keeping the bawdy house, or disorderly house, then he was guilty of the principal offense, as charged in the indictment. It would seem to be a plain proposition, and it is now settled by authority in this State, that the act of renting a house for the purpose, or with knowledge and intent of its being kept as a house of prostitution, is such an aiding and abetting and procuring the keeping the house in that manner, as renders the person who demises the house guilty of the principal offense of keeping. (*People v. Erwin*, 4 *Denio*, 129, overruling *People v. Brockway*, 2 *Hill*, 558.) So the letting of a house to a prostitute, knowing her to be such, with intent that it shall be kept for purposes of prostitution, is declared to be indictable at common law, in *Com. v. Harrington*, (3 *Pick.* 26.) So also it is said in *Ross v. Com.*, (2 *Monroe*, 417,) that "as the keeping of a bawdy

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house is a public offense, every person who voluntarily aids in establishing such a pestilent nuisance should be deemed guilty of a misdemeanor, and is liable to indictment."

II. The defendant having control of the house, so far as its possession for the time being was concerned, and having, as the jury found, put the several prostitutes who infested it into possession of it, with intent that they should use it for purposes of prostitution, and thereby aided in furnishing them with the means of pursuing their vicious course of life, is guilty of the offense charged; and the fact that the fee of the premises was in his wife and not in him, cannot, on principle or common sense, make any difference. Therefore, the doctrine of the charge was correct. It may be observed that the third count in the indictment, which charges the keeping of a bawdy house, following Chitty's precedent, (2 *Chit. Crim. L.* 39,) charges the keeping of "a certain common bawdy house," not *his* house, and "for filthy lucre and gain," not *his* lucre and gain. And Chitty says: "The charge does not respect the ownership, but the criminal management of the house." (2 *Chit. Crim. L.* 39, *note f.*)

By the Court, E. DARWIN SMITH, J. The case of *The People v. Erwin* (4 *Denio*, 129) decides that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the keeper of a bawdy house. The principle of this rule applies to any person who is personally concerned in the keeping of such a house. In misdemeanors there are no accessories. All who procure, counsel, aid or abet the commission of the crime are principals.

In this case the defendant confessedly had the control of the premises in question, and knowingly rented the building for, and permitted it to be used as, a house of prostitution. It matters not in what capacity he exercised

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such control over the house. There are no agencies in crime. The defendant's wife, who was the owner of the premises in fact, entrusted to him the power to rent them as he thought proper. She probably knew nothing of the character of the tenants he put into possession of the premises. He exercised all the power of an owner, and he must take the responsibility, and be liable to the same extent as if he were in fact the owner. He cannot screen himself from responsibility for the setting up of a disorderly house by saying that he merely acted as the agent of the owner. He did in fact personally commit the crime. He let the house to be used as a place for prostitution. It would be a reproach upon the law if it allowed him a loophole to escape the proper punishment for such a crime, upon the pretense that he was a mere agent.

The charge of the judge, rightly construed, really means nothing more than this; that his claim of agency was no excuse for his crime; and that he was liable to indictment and punishment as a principal, in keeping this bawdy house, notwithstanding that he professedly acted as an agent for the owner, in renting the premises and collecting the rents.

The language of the learned judge, in his charge to the jury, stating the law applicable to the case of an agent situated like the defendant, may perhaps be subject to some criticism, but in substance the rule was stated correctly; and the jury could not have misunderstood the meaning of the judge.

I think the conviction was right, and the judgment should be affirmed, and the proceedings remitted to the court of sessions, to be carried into effect.

[MONROE GENERAL TERM, JUNE 1, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

**RICHARD FRAZER, plaintiff in error, vs. THE PEOPLE,
defendants in error.**

Although a statutory offense is not charged, in the indictment, in the very words of the statute, yet if the substance—the substantial facts constituting the statutory offense—are well stated, that is sufficient.

Where an indictment contains some good counts and the jury find a general verdict of guilty, the conviction will be sustained, however defective the other counts may be; as the verdict will be applied to the good counts.

Any pregnant woman who shall take any medicine or drug for the purpose of procuring a miscarriage, is guilty of a criminal offense, of the same grade as that of a person administering medicine or drugs to her for that purpose, and is liable, upon conviction, to the same punishment.

The submission by a pregnant woman to an operation, or the taking of drugs, with intent to procure a miscarriage, is a moral as well as a legal offense; and that, with her confessed want of chastity, is an impeachment of such female, when examined as a witness against another, on an indictment against him for administering medicines and drugs to her, and renders a corroboration proper, even if it be not indispensable.

The testimony of the physician who was present at the birth of the child, as to the fact of the birth, and his attendance, upon the employment of the defendant, is not corroborative of the female's testimony in respect to the guilt of the defendant in previously attempting to procure a miscarriage. Hence, a charge to the jury that such evidence is corroborative of the testimony of the female in respect to "the defendant's intent and connection with the alleged offense," is erroneous.

A corroboration, to be of any avail, should be as to some matter material to the issue. To prove that a witness has told the truth as to immaterial matters, has no tendency to confirm his testimony involving the guilt of the party on trial.

FRAZER was indicted, tried and convicted, in the Lewis county sessions, of administering medicines and drugs to a pregnant female with intent to procure a miscarriage. The principal witness was the female upon whom the alleged offense was charged to have been committed, who, at the time of the offense, was a single woman, having been married in January, 1863. She testified to her pregnancy by the defendant; that in May or June, 1861, he gave her pills and powders, which she took for the purpose named, and that he subsequently took her to a Dr. Bradish, that he might operate on her for an abortion, but

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that nothing was done to or for her by Dr. Bradish. She was delivered of a full grown, healthy child, November 24, 1861. The first complaint was made against the defendant in the spring of 1862, and on that complaint this female was sworn as a witness. On her cross-examination she was asked why she delayed, from the birth of the child until the spring, before making the complaint; which was objected to, and the objection was sustained, and the question disallowed. Dr. Peden, a physician, proved that he attended at the birth of the child, and was employed to do so by the defendant. The jury were charged "that the evidence of Dr. Peden might be considered by the jury as corroborative of the witness Daly, (the mother of the child,) so far as to discover the defendant's intent and connection with the alleged offense."

The defendant requested the court to charge the jury that the witness Daly was a *particeps criminis* or accomplice with the defendant, which discredited her; and that she should be corroborated, to entitle her testimony to full credit; which was refused, and the defendant excepted. The court did charge the jury that the witness was not a legal accomplice, for the want of evidence and prosecution, although necessarily privy to the defendant's acts; to which there was an exception. The jury were further instructed, that if they found from the evidence that the witness Daly was concerned in the alleged offense with the defendant, they might give her evidence such weight and credibility as they thought best, and as it was entitled to. And to this the defendant excepted.

The defendant was convicted, and the proceedings and bill of exceptions were removed into this court, by certiorari, for review.

A. Mereness, for the defendant.

O. E. Stephens, (district attorney,) for the people.

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By the Court, ALLEN, J. Objections were made to the sufficiency of the first two counts of the indictment. I do not think them tenable. The offense, it is true, is not in the first count charged in the very words of the statute, but in substance—the substantial facts constituting the statutory offense—are well stated; and this is sufficient. (*The People v. Stockham*, 1 *Park. Rep.* 424. *Thompson v. The People*, 3 *id.* 208.) But as there are three counts to which no exception is taken, and as there is a general verdict of guilty, the conviction must be sustained, as the verdict will be applied to the good counts. (*The People v. Curling*, 1 *John.* 320; *Same v. Cooper*, 13 *Wend.* 379.)

The witness Daly was, upon her own statement, guilty of a criminal offense of the same grade as that charged upon the defendant, and was as liable, upon conviction, to the same punishment. (3 *R. S.* 5th ed. 975, § 21.) The submission to an operation, or the taking of drugs, with intent to procure a miscarriage, is a moral as well as a legal offense; and that, with the confessed want of chastity, was an impeachment of the witness, and rendered a corroboration proper, even if it was not indispensable. Her avowed enmity to the defendant went to her credibility, and the circumstances of the case resting alone upon her testimony, were not necessarily conclusive as to the guilt of the defendant. There was a fair question for the jury, upon all the evidence, as to the guilt or innocence of the accused, and no one could have questioned the verdict of the jury, either way. But if the witness Daly was in truth corroborated, so that her statement could challenge implicit belief, there was no doubt of the guilt of the defendant. The testimony of Dr. Peden was relied upon as thus corroborating the witness. And the judge charged that it was corroborative as to the defendant's *intent and connection with the alleged offense*. Now it only corroborated her as to the single fact of the birth of the child, which was not disputed, and which did not at all tend to prove the

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offense. She did not testify that she was attended by Dr. Peden, or that the accused employed him; and if she had, the case would not have been varied. They were comparatively unimportant facts, not in the least implicating the accused in a criminal offense. The claim is that the fact of the employment of Dr. Peden by the defendant to attend upon the girl at her confinement is some evidence of his paternity of the child, and this latter fact being proved, a motive existed for the commission of the offense, and that this motive thus inferred corroborates the evidence of the girl as to the actual guilt of the party. This is quite too far fetched and fanciful. It was necessary to infer a fact, to wit, the guilty connection of the accused, with the perjury of the girl from another fact which is equally consistent with the entire innocence of the accused. He may have employed Dr. Peden from sympathy for the girl and as an act of charity; or may have done so at her request, for she has not said to the contrary; and the very publicity of the personal employment of a respectable physician, when it might, if there was guilt to conceal, have been done in various ways without the appearance of the defendant, or implicating him in the least, would seem to evidence a conscious innocence and purity of purpose; at least it is capable of this construction. But concede that from this fact the jury might infer that the reason of his interest in the girl was because he was chargeable with her pregnancy, and that therefore there was a motive for the commission of the offense, that does not necessarily prove, or tend to prove, guilt in the respect charged. What would be a sufficient inducement to one man to commit a crime the most heinous would be no temptation to another to offend in the least against the laws. It is difficult to see how the performance of an act legitimate and proper in November can tend to establish the commission of a crime in May or June preceding; or how it is to be inferred that because the accused was

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willing or desirous that the girl should be properly attended and cared for, on her delivery when her full time was come, he attempted to procure a miscarriage by unlawful means, in the earlier stages of pregnancy. A corroboration, to be of any avail, should be as to some matter material to the issue. To prove that a witness has told the truth as to immaterial matters has no tendency to confirm his testimony involving the guilt of the party on trial. (1 *Greenl. on Ev.* § 381, n. 1.) In *Rex v. Addis*, (6 *Car. & P.* 388,) PATTERSON, J., said "The corroboration of an accomplice [and the rule must be the same as to any witness for any reason needing confirmation and support] ought to be to some fact or facts the truth or falsehood of which goes to prove or disprove the offense charged against the person." And in *Rex v. Webb*, (6 *Car. & P.* 595,) WILLIAMS, J., said that something ought to be proved tending to bring the matter home to the prisoners; and that proving by other witnesses that the robbery was committed in the way described was not such a confirmation of the accomplice as would entitle his evidence to credit. And see *Rex v. Wilkes*, (7 *Car. & P.* 272;) and to the same effect, *Commonwealth v. Bosworth*, (22 *Pick.* 397;) *People v. Davis*, 21 *Wend.* 309.)

The question is not whether it was indispensable to the conviction that the witness should be corroborated. I do not think it was; but that the jury might, in their discretion, have convicted upon the unsupported evidence of the witness. Whether it would have been discreet to do so is quite another question, and it is quite possible that the jury would have been unwilling to do so. And the charge that the evidence of Dr. Peden was corroborative of the testimony of the witness in respect to the principal fact, to wit, "the defendant's intent and connection with the alleged offense," may well have been, and doubtless was, influential with the jury, inducing them to give that credit to her testimony which was not due to her uncorroborated

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statement. It cannot be said that this error in the charge could not have prejudiced the defendant. There are other parts of the charge which might entitle the defendant to a reversal of the conviction; but I do not deem it necessary to remark upon them.

For the error stated, the conviction must be reversed, and a venire *de novo* awarded to the Lewis county sessions.

[OSWEGO GENERAL TERM, July 14, 1868. *Allen, Mullin, Morgan and Bacon, Justices.*]

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THE PEOPLE vs. POMEROY JONES and others.

The duties devolved upon commissioners of excise by the "act to suppress intemperance and to regulate the sale of intoxicating liquors," (*Laws of 1857, ch. 628.*) call for the exercise of discretion and judgment, and are, to some extent, discretionary and judicial.

The commissioners cannot be coerced in the exercise of their discretion, by mandamus or otherwise, and for a mere mistake are not liable, either civilly or criminally. But for an unlawful and corrupt exercise of the powers vested in them, they are answerable criminally.

They cannot willfully and knowingly violate the law with impunity; and while they are only responsible for good faith and integrity, they cannot, from corrupt motives, either grant or withhold a license improperly, and shield themselves under the judicial character of their office.

The words "inn, tavern or hotel," contained in the act of 1857, are used synonymously, to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied. The words "inn or tavern" were so used in the prior corresponding enactments.

To constitute an inn-keeper, a tavern-keeper, or hotel-keeper, the party so designated must receive and entertain as guests those who choose to visit his house. A restaurant, where meals are furnished, is not an inn or tavern. *Per ALLEN, J.*

It by no means follows that because the place was an unfit place for a tavern, or the license was improvidently or improperly granted, the commissioners of excise were necessarily guilty of a criminal offense in granting a license. To constitute an offense, the license must have been granted with full knowledge of the facts, and willfully.

The offense consists in the motive and intent with which the act was done.

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The mere granting of a license which a court or jury might say ought not to have been granted, is not an offense; but the jury must be able to say, from the evidence, that the commissioners, or such as are pronounced guilty, knew, at the time, that it was not a proper case for a license under the statute, and nevertheless granted it, in willful disregard of the statute; that is, that they knowingly and purposely disregarded the statute.

If they acted in good faith, though erroneously, they cannot be punished.

They have the power to do the act, and only a criminal intent can make the act criminal, although erroneously done.

On the trial of an indictment against commissioners of excise, for willfully, unlawfully and corruptly granting a tavern license, the court charged the jury, in substance, that if they should find that the defendants knew the character of the place licensed, yet if they believed, from the evidence, that the defendants thought the place a fit and proper one to be licensed as a tavern, under the statute, they should acquit; but if the jury, from the evidence, believed that the defendants did not consider the premises in question fit and proper to be thus licensed, but willfully and corruptly licensed the same, in violation of the statute, they should find the defendants guilty; *Held* that this portion of the charge was correct.

But that it was erroneous to charge the jury that if the act was unlawful; that is, if the license ought not to have been granted, under the statute, and the defendants intended to do the act, viz., to grant the license, they should be convicted; that they could not shield themselves because they did not suppose the act was in violation of law, or because they mistook, or were ignorant of the law, or because they supposed they were acting according to the statute.

THIS case came before the court on a bill of exceptions removed by certiorari from the court of general sessions of Oneida county. The defendants, commissioners of excise in that county, were indicted for willfully, unlawfully and corruptly granting a tavern license to one George A. Allen, of the city of Utica. Allen kept a drinking saloon at the city garden in Utica, in rear of a store on Genesee street, only accessible from the street through an alley or arched passage way, six feet wide by twelve feet high. The only bed in the building was one occupied by the attendant, in a stall or box six feet by five in size, and which had been put up as a place for eating, when the building was used as an eating saloon. The building never had any accommodations for travelers,

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and travelers never were accommodated there. On the trial it appeared that one of the commissioners personally inspected the premises before granting the license. The license was applied for upon the petition of twenty freeholders of the city, and a certificate was produced, addressed to the excise board, in addition to this petition, signed by the mayor and several of the most respectable and influential citizens of Utica, certifying that Allen had kept a "quiet, orderly and respectable house," and that they believed "that he should be licensed." The prosecution gave in evidence, under objection, a letter addressed to, and received by, the defendants, before granting the license, from a prominent gentleman in Utica, stating certain objections to the license of Allen, and, among other things, stating that his place was a "mere saloon." The question was put by the prosecution to Allen, while he was under examination as a witness, "Did you keep any beds or bedding there, for the accommodation of travelers?" which was objected to and the objection overruled, and the answer was in the negative. The court charged the jury that one question was, whether the place kept by Allen was an inn, tavern or hotel, within the intent and meaning of the excise act; to which the defendants excepted. The jury were also charged that it was for them to say whether the evidence in the case showed that the place in question had the characteristics of an inn or tavern; to which there was also an exception. And after charging, in substance, that if the jury should find that the defendants knew the character of the place licensed, yet if they believed from the evidence that the defendants thought the place a fit and proper one to be licensed as a tavern, under the statute, they should acquit; but if the jury, from the evidence, believed that the defendants did not consider the premises in question fit and proper to be thus licensed, but willfully and corruptly licensed the premises in violation of the statute, they should find the

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The mere granting of a license which a court or jury might say ought not to have been granted, is not an offense; but the jury must be able to say, from the evidence, that the commissioners, or such as are pronounced guilty, knew, at the time, that it was not a proper case for a license under the statute, and nevertheless granted it, in wilful disregard of the statute; that is, that they knowingly and purposely disregarded the statute.

If they acted in good faith, though erroneously, they cannot be punished.

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defendants guilty; and submitting that question to the jury, proceeded to charge them, as stated in the bill of exceptions, "by way of general propositions," "that if the act which the defendants did, in granting the license in question, was unlawful or in violation of the statute, and the defendants intended to do the act, they could not shield themselves, or escape conviction because they did not suppose that act was in violation of the law." To which the defendants excepted. Also, "that ignorance of, or mistake of, the law is no excuse or defense; that if the act which the defendants did, in granting the license in question, was unlawful, or in violation of law, and the defendants intended to do the act, they could not shield themselves because they mistook or were ignorant of the law;" to which there was also an exception. Also, "that if the defendants did know the true character and condition of the place kept by Allen, before or at the time the same was licensed, it was no excuse or defense that in granting the license they supposed they were acting according to the statute, if in fact the place kept by Allen was one which, according to the statute, could not be lawfully licensed." And to this proposition there was an exception.

The jury rendered a verdict of guilty against all the defendants, and judgment was stayed, and the proceedings removed into this court by certiorari.

F. Kernan, for the defendants.

H. T. Jenkins, (district attorney,) for the people.

By the Court, ALLEN, J. The duties devolved upon commissioners of excise by the "act to suppress intemperance and to regulate the sale of intoxicating liquors," (*Laws of 1857, ch. 628*), call for the exercise of discretion and judgment, and are, to some extent, discretionary and

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judicial. The commissioners cannot be coerced in the exercise of their discretion, by mandamus or otherwise, and for a mere mistake are not liable either civilly or criminally. But for an unlawful and corrupt exercise of the powers vested in them they are answerable criminally. They cannot willfully and knowingly violate the law with impunity; and while they are only responsible for good faith and integrity, they cannot from corrupt motives either grant or withhold a license improperly, and shield themselves under the judicial character of their office. The law is well guarded, and is distinct and plain in its provisions regulating the duties of the commissioners in the granting of licenses; and the legislature intended to, and I think have, hedged it about with all practicable safeguards necessary to secure all the requisite accommodations for the traveler, and at the same time protect the public against a flood of mere tippling-houses and nurseries of intemperance—drinking places not connected with a place for the legitimate entertainment of travelers. Whether the law, or any law distinguishing between the traffic in intoxicating drinks and other commodities, is wise or unwise is not for us to decide. The legislature is supreme in its action on that subject, and we have only to give effect to the laws as they are enacted. It was said by the court of King's Bench, in the last century, that "the mischief of granting a license improperly was infinitely greater than that of refusing one; for in the former case it might be productive of injury to the whole community, while in the latter the grievance was felt only by the individual." (*King v. Holland*, 1 T. R. 692.) A criminal information was sustained in that case for granting a license to an improper house. Lord Mansfield, in *Rex v. Young*, (1 Burr. 560,) speaking of the discretionary power vested in commissioners of excise, says: "But though discretion does mean (and can mean nothing else but) exercising the best of their judgment upon the occasion

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that calls for it, yet if this discretion be willfully abused it is criminal, and ought to be under the control of this court." The information in that case was refused, because the justices had "acted both honestly and legally in refusing to grant the license in a place where there was already a sufficiency."

An indictment for willfully and corruptly granting a license to a person to sell spirituous liquors as an innkeeper, the commissioners knowing that the applicant was not a man of good moral character, nor a person of sufficient ability to keep a tavern, was sustained, on demurrer, in *The People v. Norton*, (7 Barb. 477,) and the reasoning of Judge Willard is entirely conclusive. And see, to the same effect, *The State v. McDonald*, (4 Harr. 555,) and *Russell on Crimes*, 116. The act of 1857 (*supra*, § 6) absolutely prohibits the granting of a license to any person to sell strong and spirituous liquors to be drank on his premises, "unless such person proposes to keep an inn, tavern or hotel, and unless the commissioners are satisfied that the applicant is of good moral character; that he has sufficient ability to keep an inn, tavern or hotel, and the necessary accommodations to entertain travelers, at the place where such applicant resides or proposes to keep the same." And the same statute (§ 8) requires every keeper of an inn, tavern or hotel in a city to keep at least three spare beds, and the necessary bedding, for the accommodation of travelers." The terms "inn, tavern or hotel," mentioned in the statute, are used synonymously, to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied. The words "inn or tavern" were so used in the prior corresponding enactments. (1 R. S. 679, § 10. *Overseers of the Poor of Crown Point v. Warner*, 3 Hill, 150.) A "hotel" is an inn or house for entertaining strangers or travelers. An "inn" is a house for the lodging and entertainment of travelers.

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In America, Webster says it is often a tavern where liquors are furnished to travelers or others. "Tavern," the same lexicographer says, is, in some of the United States, synonymous with inn or hotel, and denotes a house for the entertainment of travelers, as well as the sale of liquors. (*See Webster's Dic.*) Bouvier defines an "inn" as a house where a traveler is furnished with every thing he has occasion for while on his way; and he gives substantially the same definition of a "tavern." (*Bouvier's Law Dic.*) To constitute an inn-keeper, a tavern-keeper, or hotel-keeper, the party so designated must receive and entertain as guests those who choose to visit his house; and a restaurant where meals are furnished is not an inn or tavern. (*Wintermute v. Clark*, 5 Sandf. 242. *Carpenter v. Taylor*, 1 Hilt. 193.)

It is very evident that the place of Allen was not an inn, tavern or hotel, and could not have been connected with one, and that he had not the ability at that place to keep a tavern with the necessary accommodations for travelers, or in any way to comply with the statute; and there is no pretense that he proposed, or that it was expected, to use his license at any other place. It is equally evident that a tavern was not required for the accommodation of travelers, at that place; and that the license was not wanted for the convenience of a house of entertainment for travelers. But it by no means follows that because the place was an unfit place for a tavern, or the license was improvidently or improperly granted, the defendants were necessarily guilty of a criminal offense in granting the license. To constitute an offense the license must have been granted with full knowledge of the facts, and willfully. (*See King v. Holland, supra.*) The offense consists in the motive and intent with which the act was done. The mere granting of a license which a court or jury might say ought not to have been granted, is not an offense; but the jury must be able to say, from the evidence, that the commissioners,

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or such as are pronounced guilty, knew, at the time, that it was not a proper case for a license under the statute, and nevertheless granted it in willful disregard of the statute; that is, that they knowingly and purposely disregarded the statute. If they acted in good faith, although erroneously, they cannot be punished. (*Commonwealth v. Bradford*, 9 Met. 268.) It is not like the case of an absolute want of power to do the act, as in *Rex v. Sainsbury*, (4 T. R. 451;) or where a positive duty is imposed by law upon an officer, as in *The People v. Brooks*, (1 Denio, 457.) Here the defendants had power to do the act, and only a criminal intent could make the act criminal, although erroneously done. The main proposition in the charge was, upon this view of the law, correct; but for "the general propositions" which followed it there would have been no error, I think, for which the conviction should be reversed, although one or more of the other parts of the charge might have been somewhat more explicit. I understand the court to have instructed the jury that if the act was unlawful; that is, if the license ought not to have been granted, under the statute, and the defendants intended to do the act, that is, to grant the license, they should be convicted. The charge was that they could not shield themselves because they did not suppose the act was in violation of law, or because they mistook or were ignorant of the law, or because they supposed they were acting according to the statute. This was in effect placing the jury in the place of the commissioners, to review their decision, and if it was found out to have been warranted by the statute they were to convict; for that the commissioners signed the license intentionally and voluntarily was not disputed; and this was the only other fact necessary to a conviction. It is true this is in direct conflict with the other portions of the charge, but it is in the bill of exceptions, and is not a correct exposition of the law, and we are not at liberty to speculate whether it did or

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did not mislead the jury. In this part of the charge the principles of *Rex v. Sainsbury* and *The People v. Brooks*, where a positive law was violated and a positive duty neglected, and where the intent was a legal presumption, were applied to this case where the law gave a discretionary power, and the intent and motive was all important, and was the question of fact to be passed upon by the jury. As bearing upon this, the knowledge by the defendants of the place and all its surroundings, and its previous history, the communications from others and all the circumstances, were relevant and competent as evidence.

For this error in the charge the conviction must be reversed, and a venire *de novo* awarded to the sessions of Oneida county.

[OSWEGO GENERAL TERM, July 14, 1865. *Allen, Mullin, Morgan and Bacon, Justices.*]

BERNARD FRIERY, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

The statutory regulations for the drawing and summoning of jurors were not made for the benefit of parties to trials by jury and for the purpose of securing to such parties (in civil and criminal proceedings) an impartial array of jurors from which the jury to try the issue might be taken, but were made for the purpose of securing an impartial distribution among citizens of the onerous duty of performing jury service.

Hence, in the absence of any suggestion of fraud or of misconduct, other than the mere failure to observe the regulations, the public, only, can complain that the regulations have been disregarded. A challenge to the array, by a prisoner on trial, will not lie for a disregard of the directions of the statute. The property or assessment qualifications of jurors, prescribed by the Revised Statutes, have been repealed, in respect to the city of New York.

Where jurors are challenged for principal cause or for favor, and upon the triors finding against the challenges, the jurors are challenged peremptorily, by the prisoner, the questions raised previous to the peremptory challenges are not open for examination at the instance of the prisoner.

Intoxication is never an excuse for crime. Even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of con-

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ceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act.

Where the killing of another is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime.

ERROR to the New York general sessions, to review a conviction of the plaintiff in error, for the murder of Henry Lazarus, charged to have been committed on the third day of January, 1865.

The prisoner complained of certain errors alleged to have been committed on the trial, in respect to the organization of the jury, the rulings of the court as to evidence, and the charge of the court to the jury.

On the trial the prisoner challenged the array of one thousand jurors returned by the sheriff, being an extra panel ordered by the court. The causes of challenge to the array (eight in number) relate to the bias of the sheriff and to the mode of drawing and summoning of the jurors, and were claimed by the prisoner to be in direct violation of the statute relating to the summoning and drawing of jurors. The prosecution demurred to the challenge, and the court sustained the demurrer.

The prisoner also challenged, for principal cause and for favor, several jurors. The objections made to them individually appear in the points. The prisoner insisted that errors were committed by the court on these challenges. The prisoner challenged several jurors for principal cause and for favor, who were, notwithstanding his objections, admitted to be good jurors, and he then challenged certain jurors peremptorily. The prisoner, before the calling of the last juror impaneled, had exhausted all his peremptory challenges.

After the jury was impaneled, a case substantially as follows was presented to the jury. Friery and the deceased Lazarus kept drinking saloons near to each other, in East Houston street, in the city of New York. On the morning of January 3, 1865, between three and four o'clock,

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two men drove up in a sleigh to Friery's place, where they remained about five minutes. They came out with Friery, who had been "beastly drunk" during the night before, and had been drinking hard for a week. The party went into Lazarus' drinking saloon. Lazarus, who was also under the influence of liquor, so much so that his bar-keeper, Connell, wanted to get him off to home and to bed, was in the bar-room with two other men. California Jack, one of Friery's companions, offered to bet that he had a man who could lick any other man there. Lazarus took up the challenge and offered to fight any man there, at the same time taking off a handkerchief, in which his hand was wrapped up. There was some tendency to disturbance, but no blows were struck. The bar-keeper turned round to get some cigars, and he heard Friery say, "You are a good little man, Harry," and as the bar-keeper turned back to the counter, Friery had just drawn a knife out of Lazarus' neck. There never was any personal difficulty between the prisoner and deceased. The evidence showed that both parties were grossly intoxicated at the time of the homicide. On the morning preceding the alleged murder the prisoner came into Lazarus' place, between four and five o'clock; he was drunk at the time, and had a two-edged dagger knife which he stuck into the counter, saying, that "will be the death of somebody here before long," or "sombbody yet," or "some son of a bitch yet." Lazarus was not there at this time. On another occasion, two weeks before the homicide, Friery came into Lazarus' place drunk, when there was a large dog lying sick at the time under the table in the bar-room. Friery took an ice pick out of his pocket and commenced beating the dog, and jabbed the sharp end of the pick down the dog's mouth and broke out some of his teeth, saying that he could make the dog sing. All this evidence was objected to by the prisoner. There was no evidence that Friery knew the dog to belong to Lazarus; and there was

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another dog belonging to the bar-keeper about the place at the same time. Evidence was also given as to Friery's conduct on the evening of January 2, 1865, between six and ten o'clock, showing that he took a mustard cup and threw it across the room. This was also objected to by the prisoner.

The court charged the jury, among other things, as follows:

"It does not appear by the evidence in this case that any personal quarrel had occurred between the prisoner and the deceased at any time prior to the occurrence which resulted in the death. Certain things have been proven upon the trial to have occurred in the place kept by Lazarus, and to these I shall briefly call your attention. One scene, you recollect, described by the witness, as when the prisoner at the bar was leaning against the counter and drew a dagger or knife from his pocket, plunged it into the counter, and made the remark, that this 'will be the death of some one yet.' One of the witnesses said, 'some one here,' or 'about here,' but he was not sure on cross-examination whether the word 'here' was used or not, or whether the expression was, 'this will be the death of some one, or some son of a bitch yet.' Another was the occurrence of the beating of the dog, when the sick dog lay under the table, near the stove, in Lazarus' place. The prisoner at the bar came in there in a state of partial intoxication, and with an ice pick beat the dog upon the head, and afterwards knocked out his teeth. The other was the occurrence when the prisoner came into the saloon, and, after taking a drink, seized a mustard cup from the lunch table and threw it against the wall. Those three occurrences have been proven here on the part of the prosecution to show, as is claimed by them, that at the times mentioned, feelings of hostility existed on the part of the prisoner against the deceased, and as bearing upon the question of malice in the commission of the act with which

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he is charged. Now, I told the counsel, in your hearing, when these facts were offered in evidence, that in my judgment of the law any act of the prisoner, in reference to the deceased or the property of the deceased, at any time shortly before this fatal occurrence, was admissible in evidence as bearing upon the question of malice; but what degree of importance is to be attached to these acts is for you to say. For instance, the affair in regard to the dog. Unless the prisoner knew that it was Lazarus' dog, any act of his towards it would be of no importance whatever in this case. If he knew it to be Lazarus' dog, or had good reason to believe it was, and then exercised towards it this cruel treatment, it would be a question for you to determine whether his treatment of the dog was an act indicative of personal hostility to Lazarus, or whether it was a mere act of reckless brutality (if I may say so) exercised towards a dumb beast. If it was the latter, however much it might be censured, yet, in considering the case of this prisoner, it would have no bearing upon the question of malice in the commission of the crime with which he is charged. No matter what his previous conduct may have been in regard to this animal, or in regard to other matters, if you should find it was merely the result of a want of appreciation of the proprieties of life, or that the acts were acts of recklessness or brutality, then the prisoner upon this trial should not be prejudiced by them. So in regard to the mustard cup. If you should find that he threw it against the wall merely in a spirit of drunken recklessness, and that it did not indicate any feeling of personal hostility to the deceased, it would be an unimportant fact. So in regard to the sticking of the dagger in the counter. If you should come to the conclusion, on looking at all the testimony, that the remark that it will be the cause of the death of some one soon, had no application to the deceased, or had no reference to the crime which has since been committed, it should disappear from

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the case, and be treated as unworthy of consideration. On the other hand, if you should believe that all these acts were acts growing out of personal hostility—if you should find that they were acts indicative of his state of mind toward the deceased, they would bear very materially on the question of malice, or the intent to commit the offense with which he is charged. So these may be or may not be important.” * * * *

“Now, in regard to intoxication, I shall not attempt to lay down any new law or state any views of my own, because it is settled in this State, as it is in Pennsylvania. I shall content myself by reading you the law as stated by the courts. In the case of *The People v. Rogers*, (18 N. Y. Rep. 9,) it was said: ‘We must lay out of view, as inapplicable, the case of a person who had become insensible from intoxication, and who was performing an act unaccompanied by volition.’ It is not claimed in this case that the prisoner at the bar was a person who had become insensible from intoxication, and who was performing an act unaccompanied by volition; therefore you must look at the prisoner, not as a man in that state, but merely as one who was more or less under the influence of liquor. The degree of intoxication you may determine in your own mind, if you can. If you consider him as a man who was intoxicated, but yet sensible and able to do an act in accordance with his will, the law is very plain. The courts have laid down this rule. No rule is more familiar than that intoxication is never an excuse for crime. There is no judge who has been engaged in the administration of criminal law who has not had occasion to assert it. Even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus if a man, without provocation, shoot another, or cleave him down with an axe, no degree of in-

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toxication, short of that which shows that he was at the time utterly incapable of acting from motive, will shield him from conviction. In this case the defendant had struck the blow which caused the death, and to this act the law, without further proof, would impute guilty design. If the perpetrator would escape the consequences of the act thus committed, it was incumbent on him to show either that he was incapable of entertaining such a purpose, or that the act was committed under provocation. The adjudications upon the question, both in England and this country, are very numerous, and are characterized by a singular uniformity of language and doctrine. They all agree that, where the killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated, cannot be allowed to affect the legal character of the crime. There is nothing in our statute, gentlemen, which gives us reason to say that the legislature intended to be understood as altering the rule laid down by the court in the case of *The People v. Rogers*; nothing to lead us to believe that the legislature meant to say that, because a man was intoxicated when he designedly took the life of another, his crime was to be reduced to murder in the second degree. In the recent case in Pennsylvania the same doctrine is substantially laid down, where the court says: 'No one pretends that intoxication is of itself an excuse or palliation of a crime. If it were, all crimes would, in a great measure, depend for their criminality on the pleasure of their perpetrators, since they may pass into that state when they will. But it is argued that, because intoxication produces a state of mind that is easily excited by provocation, therefore the crimes committed under the influence of such intoxication and provocation are less criminal than when committed in a state of sobriety under the same provocation. We are very sure that no statute will ever announce such a rule, and we are not authorized to announce it in interpreting the statute.'

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The courts allow evidence of intoxication to be given to the jury, and the reason is very well stated by the court in the case of *The People v. Rogers*, and has been very well stated by the counsel here to-day. It is proper for the consideration of the jury in several aspects: First, as bearing upon the question of intent. A man may be so drunk as to be incapable of forming any intent. That may be the case. What would be the law in such a case is unnecessary to discuss any further than I have done. Evidence in regard to intoxication is admitted, for the purpose of giving the jury an opportunity to say how much weight is to be attached to expressions made immediately before and after the occurrence. The evidence of this man's intoxication is material, in determining what weight or importance is to be attached to the act of sticking the knife into the counter and the declaration accompanying it, or the expression used in the sleigh, 'The man is dead any how,' or to the expression used by him, 'I will dance at the wake.' Such expressions would have more force with the jury if made by a sober than by an intoxicated man. Courts allow such evidence to come in and to be considered by a jury; but although they allow it to be considered, they declare intoxication is no excuse for crime, unless it exists in the degree before mentioned. Now, gentlemen, among the various propositions which have been submitted by the counsel for the prisoner, I find one or more to this effect—'That to convict the prisoner of murder in the first degree, it is necessary for the prosecution to show affirmatively, beyond reasonable doubt, that the prisoner had an intent to kill the deceased.' Of course that is so, and I have so charged. It must be shown beyond a reasonable doubt that he intended to kill, but if the intention exists a moment before the blow is struck, as I have already told you, it is enough. The other proposition, 'that the prosecution must affirmatively prove that the prisoner's mind was in a condition to form the intent,' is

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involved in the general propositions which I have submitted to you. The other propositions in regard to intoxication, and in regard to the purpose for which evidence of intoxication is allowed to go to the jury, also in regard to the presumptions of law, and the general proposition that the prisoner is entitled to every reasonable doubt, I have already charged."

The jury found a verdict of guilty of murder in the first degree.

The prisoner's counsel asked the court to charge certain propositions. They were charged in a modified form. The charge of the court, arising out of the evidence as to occurrences on the morning previous to the murder, was on the question of malice, claimed to be calculated to mislead the jury as to the intent of the prisoner. It was insisted the charge was erroneous, so far as it laid down the law to be that the presumption was that Friery intended to kill Lazarus, whereas the jury should have been told that, under the gross intoxication Friery was in at the time, they should determine whether the prisoner had the intent to murder or not. It was claimed that the case came within the provision of the statute (*Laws of N. Y.* 1858, p. 556, § 2,) which provides that on an appeal from the court of New York general sessions, the appellate court may order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

John Sedgwick and *John McKeon*, for the plaintiff in error. I. As to the summoning and organization of the jury. The challenge to the array should have been sustained by the court and the demurrer of the people overruled. The facts charged by the prisoner and admitted by the demurrer were substantially—(1.) That the sheriff or summoning officer was not indifferent, which is a good cause for chal-

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lenge; and (2.) That the main provisions of the statute in relation to the summoning of jurors had been violated. The same question having been raised and argued before the court at the present term, (September, 1865,) in the case of *The People v. Ferris*, the court is referred to the points of the defendant's counsel in that case, on that subject. In addition the following authorities are referred to: *Regina v. O Connell*, (11 Cl. & Fin. 351 to 365; 2 Wharton's Cr. Law, §§ 295, 296.) The words of the statute are imperative, in fact prohibitory, not directory: "Unless the sheriff or other parties named in the statute appear to witness the drawing of jurors, and not otherwise, the drawing cannot be proceeded with." "Negative words in a statute will make it imperative. (*Dwarris on Statutes*, 715.) The word 'shall' is used in all the other sections, and is as imperative a word as could have been used. In determining whether a provision in a statute is directory or peremptory, the test is, Is the provision of the essence of the requirement or of the form or manner of it? (*Striker v. Kelly*, 7 Hill, 9. *Marchant v. Langworthy*, 6 id. 646. *Rex v. Loxdale*, 1 Burr. 447.) The paper claimed to be a record has none of the attributes of such a document. It is not "the proceedings of a court of justice." (*Burr. Law Dict. Verbum "Record."*) The argument of the prosecution that the prisoner must show that injury has been done to him, is not tenable. In O'Connell's challenge the words showing that the special jury list was made up "as aforesaid," for the purpose and with the intent of prejudicing the defendant on the trial, were omitted. (*O'Connell's case*, 9 Jurist, 27.) On a challenge for irregularity in the summoning of a jury the court say the question is not, had mischief been done, but whether, under such circumstances, it might have been done. (1 *Crawf. & Dix*, 125. 2 *M. & S.* 41.) The prisoner complains of the violation of an imperative rule in relation to the challenge, (*Joy on Juries*, 126,) and if that violation be sanctioned, in the language of

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Lord Denman, jury trial becomes "a mockery, a delusion and a snare." (*Regina v. O'Connell*, 11 *Ol. & Fin.* 351. *Cancemi v. People*, 18 *N. Y. Rep.* 129.) The cases cited by the district attorney do not sustain his position that the statute is merely directory. The cases cited are on peculiar statutes in our own country. His main dependence is on Irish *nisi prius* cases, tried and decided in Ireland, in the midst of political excitement, by judges, the creatures of the British government, ready to make a "record of bloody assizes," to be avoided, not followed, by judges of our State tribunals.

II. The challenge to the respective jurors should have been sustained. (1.) The juror Davis, challenged on the ground that he did not own real estate, and had not been taxed for personal estate, should have been set aside. Not sufficient freehold is a good cause of challenge. (*King v. Edmonds*, 4 *B. & Ald.* 492. 3 *R. S.* 4th ed. 695.) (2.) The juror Charles H. Hadden was improperly admitted as a juror. He had been challenged for principal cause, on the ground that he had formed an opinion that a crime had been committed. This challenge was overruled, and then he was challenged for favor. The court should have given to the jurors the instructions requested. "The juror should stand indifferent as he stands unsworn." (3.) The juror Brewster was challenged for principal cause, that he had read something of the transaction, and had formed an opinion that a crime had been committed. The court should have rejected the juror. (4.) The juror Wood was challenged for principal cause, on the ground "that he had read of the transaction, and had formed an opinion as to it." If the party was the prisoner, he had formed an opinion. He presumed he was the guilty party, if he was the prisoner. The fact of his forming an opinion on the case was not destroyed by his saying that he had formed no opinion as to Bernard Friery being guilty or innocent of killing Harry Lazarus. The name amounted to nothing. The juror had his mind fixed against the prisoner.

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The evidence taken on the challenge for favor cannot be used in determining the challenge for principal cause. The juror, on being challenged for favor, admitted he had made up his mind that a crime had been committed; that he recollected the names of Friery and Lazarus, and that Friery was the name of the man charged with the killing; that he had a presumption that he was the party who did the deed; and that it would certainly require evidence to remove that presumption. He replied to the questions of the district attorney, that if the facts he read in the paper were true, he, Friery, was probably guilty, but he said that he had no impression that would bias his mind against the evidence he would hear as a juror. The court said that "the indifference of the juror was not a question to be solved by any rule of law, but by the common sense of the jurors." The question was one of fact, under the instructions of the court as to the law. The question as to his impartiality between the people and the prisoner is not to be a mere whim of jurors.

(5.) The juror Hazen was improperly admitted as a juror. On being challenged for principal cause, he admitted that he had read of the matter, that he remembered the principal facts, and he believed them to be true; that he certainly believed that a crime had been committed, and that the crime referred to the facts concerning the murder of Lazarus. The challenge for favor being interposed, he admitted that he had an impression and an opinion that some one had committed murder or manslaughter. The court charged the triors that the instructions he gave in similar cases must be their guide. The court referred, undoubtedly, to its previous charge, in which he laid down the law that there was no absolute rule of law which he could give the triors for their guidance. (6.) The juror Eaton should have been rejected. He was challenged for principal cause, that he formed an opinion, but whether he expressed it or not he could not say. The

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opinion formed was, that a premeditated murder had been committed; he based his opinion on the facts as he had heard them. The juror said that his mind was made up as to the crime of murder, if premeditated murder had been committed, and had some impression, he admitted, that Friery was the man who had committed the murder. (7.) The juror Carpenter should have been rejected on the challenge for principal cause, as he had formed an opinion as to the matter that a crime had been committed, although he did not make up his mind who did it. He admitted that he made the remark, that "whoever did it ought to be punished." The prisoner was compelled to challenge him peremptorily, and was compelled to exhaust his challenges before the jury was complete. (8.) The juror Hicks should have been rejected. He was challenged for principal cause, that he formed the opinion that a crime had been committed, and this opinion was formed on reading and talking of the matter. (9.) The juror Newton should have been rejected. On being challenged for principal cause, he stated that he formed an opinion from reading about the matter in the *Herald*, that a crime had been committed. Before this juror was sworn the prisoner had exhausted all his peremptory challenges. (10.) The ten jurors who were peremptorily challenged should have been set aside under the several challenges for principal cause or for favor, and the prisoner should not have been compelled to have recourse to his peremptory challenge.

III. Rulings of the court as to evidence. (a) The evidence in relation to the transactions previous to the day of the homicide was improperly admitted. The occurrences testified to on days previous to the homicide tended to show that the prisoner was a brutal-minded man, and thus, in fact, having all the effect of proof of bad character of the prisoner. All the evidence did not show that the dog attacked by the prisoner belonged to the de-

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ceased, and that the prisoner knew that the dog belonged to the deceased. The court seemed to be of opinion that these transactions might be acts growing out of personal hostility, indicative of a state of mind towards the deceased, and might materially affect the question of malice or intent to commit the offense with which he was charged. How these acts, committed at a different time from the homicide, could be pertinent to the issue, it is difficult to understand. (b) The question whether a part of the custom of Lazarus' house came from women, was improperly rejected. The object of it was to show that the place where the witness was the bar-keeper was the resort of prostitutes, and thereby submit the question of credibility of the witness to the jury. (c) The question as to what, if any thing, was said between California Jack, Clark, McDonald and Friery, in F.'s bar-room, should have been allowed. The district attorney claimed that the parties named were confederates. The object of the prisoner's question was to show that they were not confederates, and that so far from having arranged any attack on Lazarus in Friery's bar-room, they went for an innocent purpose into Lazarus' place, viz., to get cigars. As the stabbing was apparently without motive, and occurred immediately after leaving Friery's house, the fact sought to be proved would have affected the charge of malice, so far as murder was concerned.

IV. Charge of the court. (a) The charge of the court, founded on the evidence given of transactions previous to the murder, was calculated to mislead the jury on the intent of the prisoner—on the malice necessary for the crime of murder. (b) The charge that the law presumed from the facts that Friery intended to kill Lazarus. It had been conclusively proved that Friery was beastly drunk, and under that state of facts the court should have told the jury that from the facts they should determine whether the prisoner had the intent to murder or not.

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A. Oakley Hall, (district attorney,) for the people. The district attorney proposes to argue in support of this conviction, substantially, the following general propositions, to which the alleged errors attach :

1. The court properly refused, upon the challenge presented, to quash the array, or rather, to be more precise, the certificate of proper drawing and summoning.

2. The questions which concern the jurors who were peremptorily challenged after those questions arose, cannot be reviewed.

3. The jurors who were sworn under exceptions from the prisoner were legally competent jurors.

4. The evidence objected to was properly received.

5. The recorder's charge is unexceptionable

6. The substantial justice of the whole case cannot be reviewed, but only errors of law.

I. The challenge to the array was insufficiently and improperly presented, and the demurrer was well taken, and the challenge properly overruled. (1.) What was it that the challenge attacked? Because, like as in demurring to an answer, the complaint must be inspected, so in estimating the sufficiency in law, of a demurrer to a challenge, that which the challenge attacks must be first inspected. A panel was duly certified and duly filed in open court before the challenge was presented. (2.) The panel filed imported verity upon its face, and stated full compliance with the requirements of the statute. (2 *R. S.* 431, *Edm. ed., marg. paging* 414, § 29; *No. 8, and* § 30.) (a) "A list of the names of the persons so drawn, with their additions and places of residence, and specifying for what court they were drawn, shall be made and certified by the clerk and attending officers, and shall be delivered to the sheriff of the county. The sheriff shall summon the persons named, &c. He shall return the said list to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was

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notified." (b) This panel so certified into court was, in short, "a written memorial, made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." (*Bouv. Law Dic. Verbo "Record."*) (3.) The challenge, therefore, substantially attacked the verity of a record. It went no further than to deny the facts of the certificate. Will the court note the peculiarity of this challenge? It does not challenge, as is usual, the jurors now arrayed, (*see Verbo "Array," in Jacob's Law Dict., fol. 23;*) but it "challenges the array of the jurors upon the panel or list of jurors this day filed." It is a challenge against the list. (a) The challenge alleged omissions and irregularities in a general way only. It did not charge false certifying, nor collusion, nor forgery, nor fraud. (b) Says Joy, on *Challenges*, § 1: "Nor can the array be challenged for a cause which contradicts the record. This would be a direct averment against the record, as the array is returned by the sheriff, and the return is accepted." (c) The certificate of the officers who draw and summon the juries is conclusive against this mode of attack. "The certificate of the officer selecting a grand jury is a record, and cannot be impeached by showing that it was not signed by the clerk whose name appears to it, and that he was not present when the duties were performed. Such certificate is the proper evidence of the manner in which the jurors were returned." (*State v. Clarkson*, 3 *Ala. Rep.* 378; *Reaffirmed in* 9 *Ala. N. S.* 8-17. *O'Connell's Nisi Prius case*, 1 *Cox's Cr. Cases*, 395, 396.) (d) Suppose that the certificate was not filed in the court, but was elsewhere, and there was issue on the challenge; then the certificate would have been read in evidence; would the court permit it to be attacked orally? "Oral evidence is not admissible to impugn the certificate of the officers selecting grand jurors as required by law." (*State v. Allen*, 1 *Ala. Rep.* 442. (4.) The challenge contained two grounds:

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1st. Interest of summoning officer. 2d. Non-compliance with the directions of the statutes in preparing the panel. (a) Ground number one is disposed of in favor of the people by the statutes. (2 R. S. 759, *Edm. ed.* § 10, or *marg. paging* 734, in connection with *id.* 437 and 420, *marg.*, §§ 56, 57. *Revisors' Notes* in 5 *id.* 473.) (b) Ground number two is not the subject of challenge to the array. Well stated in C. B. Sedgwick's brief in *Reed's case*, (2 *Blatch. C. C.* 443,) in which case there was a strife between counsel opposing, whether the action was a motion to quash, or whether it amounted to a challenge. One counsel seeking the motion, because unwilling to encounter this law of challenge which we invoke; the people's counsel, for the same reason, desiring to invoke it. (c) The only grounds are unindifferency, partiality, or a default amounting to misconduct, in the drawing or summoning officers. (*Joy on Challenge*, § 1.) (d) The note to *Pringle v. Huss* (1 *Cowen*, 432) contains the whole common law as to challenge to the array. (*Per Judge Nelson*, in *Reed's case*, 2 *Blatch. C. C.* 446.) And clearly this challenge, attentively read, is not within any known instance. (e) "It is no ground of challenge to the array if the sheriff in the main pursue the Pennsylvania act respecting the jury, without fraud." (*Comm. v. Lippard*, 6 *Serg. & Rawle*, 395.) (5.) "The statutes for selecting jurors, drawing and summoning them, form no part of a system to procure an impartial jury to parties. They establish a mode of distributing jury duties among persons in the respective counties, subject to that kind of service, and of setting apart those of supposed higher qualifications for the most important branch of that service; they provide for rotation in jury service; they prescribe the qualification of jurors; and the time and manner of summoning them, and are directory to those whose duty it is to select, draw and summon persons for jurors. By this means the court is supplied with jurors to aid in the administration

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- of the laws. Every person subject to that kind of duty is called out, in turn, to perform it, and those called on have timely notice. So that they may arrange to perform a public duty at the least inconvenience to their private affairs." (*Rafe's case*, 20 *Ga. Rep.* 60.) (a) In *Queen v. Conrahy*, the counsel for the crown argued respecting a challenge to the array, that "if such a plea as this were held good, if, where so many preliminary steps are directed by the act to be done by so many different persons, the slightest irregularity in any one of them, the slightest mistake on the part of any one of the constables, collectors, justices, clerk of the peace, sheriff or sheriff's officers, is to be deemed sufficient to vitiate the whole panel, the most mischievous consequences would follow, justice would be constantly defeated, &c. It is perfectly clear, however, that the enactments relied on in the challenge are only directory." He was interrupted by the court, (1 *Craw. & Dix's Irish Rep.* 62,) who said: "Questions similar to those raised in this case were discussed and decided at the assizes for Kerry. It was there held, and rightly as I conceive, that the enactments in question were directory only—the officers appointed to carry them into effect being punishable in case of neglect or misconduct." After counsel for defense had answered, the court sustained demurrer to the validity of the challenge, saying: "I have not the slightest doubt that this is not a valid challenge to the array; the statute (3 and 4 *Will IV. ch.* 91) contains numerous enactments with reference to the mode of returning the names of persons qualified and liable to serve as jurors in Ireland, and if those enactments were to be held other than directory—if the non-observance of any one of the many directions therein contained were to be deemed sufficient to vitiate the whole panel, the consequence would be that the whole fabric of justice would fall to the ground. But I am of opinion that the enactments contained in the fourth, fifth, sixth, seventh,

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eighth and ninth sections of the statute are merely directory, and the non-observance of the directions thereof is not ground of challenge to the array, although such non-observance may be punished by visiting the officer neglecting or violating his duty, with the penalty imposed in that behalf by the statute." (6.) If it be said that the words "and not otherwise" are mandatory in the section about attendances of officers—and this being answered by the reliance upon the certificate stating that the officers *did* attend—yet the subsequent provisions are clearly affirmative and merely directory. (a) How liberally in criminal cases our own courts have construed a statute as directory, appears from *Dawson's case*, (25 *N. Y. Rep.* 405,) where the court held that an indictment not filed was valid, saying: "There being no words in the statute indicating an intention on the part of the legislature that the indictment should be void if not so filed, this provision must be regarded as merely directory," and citing authorities. And also in *People v. Cyphers*, and *People v. Kenny*, (*MS. opinions of Court of Appeals*.) (b) Objections to the array, because the selection of the jurors varied in unessential particulars from the laws, will not be heard. (*Forsythe v. State*, 6 *Ham.* 19.) (c) All that can be said by our adversary is, that the (*ex gratia* admitted) irregularities actually brought into court the same jurors who would have come had every jot and tittle of the direction as to drawing been fulfilled. (d) Statutes directing the mode of proceeding by public officers have always been treated as advisory, and not intended to invalidate the vitality of the proceedings themselves, unless expressly so declared. (8 *Verm. Rep.* 276, 280.) (e) Thus the omissions, should the certificate be impugned, did not avoid the drawing; nor has the defendant charged, nor offered to show, injury to himself because of these omissions.

II. The provisions respecting property or assessment qualifications of jurors (2 *R. S.* 428, § 3, *Edm. ed., marg.*

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pages 412) are repealed in New York county, (*Davies' Laws*, 941, § 1,) and therefore the objections on this score to jurors are untenable.

III. The challenges for principal cause were properly overruled by the court; and its charges to the triors were clear, legal, and remarkably free from usurpation of the province of the triors. (1.) The opinion formed or expressed must be individual towards the culprit—in England it must be in the nature of express malice; but here the implied malice has been held to be sufficient. But in no case does it appear that the fight was made in behalf of the legal logic of the English doctrine. (2.) Reference to these charges shows their legal accuracy. *Freeman's case* (4 *Denio*, 31) effectually disposes of all questions antecedent to peremptory challenge.

IV. The legal sincerity of counsel did not place any reliance, apparently, upon any of the exceptions to evidence excepting the evidence of the prisoner's declaration regarding the dog. We will therefore only argue this exception, and contend that the declarations were admissible. (1.) The weight of this evidence was probably light compared with the greater and more convincing evidence of malice in the case to be found at fols. 153, 196, 197. (2.) The recorder carefully guarded this weight in his charge to the jury. (3.) It was a recent declaration of ill will toward property of the deceased, made in the utterer's place of business, at the scene of the homicide, very shortly before its perpetration. (4.) In *Rector's case*, (19 *Wend.* 591,) it was said: "In the prosecution of a crime so essentially the creature of intent as murder, everything pertinent should be submitted to the jury upon which they can infer an absence of malice." Surely the converse—presence—is as true. (5.) A man is in B.'s stable one week and maims B.'s horse maliciously, and the next week maims and kills B. himself, in that very stable. Is not the first maiming competent and relevant as a fact upon which to argue

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malice against the owner at that time? Surely it is an act of great malice to injure inanimate property; and worse to injure unoffending animate property of a foe. (6.) In the case of *People v. Conkey*, *Court of Appeals*, (5 *Parker*, 32,) the court sanctioned the admission at *nisi prius*, under exception in a rape case, of evidence showing that after the offense, as well as about its contemplation, the prisoner "overturned the stove, threw meat out of the window, broke the glass, and committed certain trespasses upon the property of the complainant." V. The recorder's charge to the jury upon intoxication as a defense, and upon the legal requisites of murder in the first degree, were consonant with the well recognized principles enunciated by the Court of Appeals and this court. (*Rogers' case*, 18 *N. Y. Rep.* 9. *Jefferd's case*, *MS. opinions*. *Walter's case*, 19 *Abb.* 212. 32 *N. Y. Rep.* 147.)

By the Court, SUTHERLAND, J. It appeared from the challenge to the array, that the statute regulating the drawing and summoning of jurors had been directly violated or grossly disregarded, and the very important question in this case is, did the court below err in sustaining the demurrer to the challenge, and in refusing to grant the array.

The same question was presented in *Ferris's case*, argued at the same term,(a) and though I have serious doubts upon the point, yet I have not been able to satisfy myself that I would be justified in dissenting from the views expressed by Justice Leonard in his opinion in that case.

The question is, with what purpose or intent were these statutory regulations for the drawing and summoning jurors made? Were they made for the benefit of the parties to trials by jury, and for the purpose of securing such parties (in civil and criminal proceedings) an impar-

(a) Reported in the Court of Appeals, 81 *How. Prac. Rep.* 140; 35 *N. Y. Rep.* 125.

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tial array of jurors, from which the jury to try the issue might be taken; or were these statutory regulations made for the purpose of securing an impartial distribution among citizens of the onerous duty of performing jury service? If the former was the purpose or intent, then it is clear that the demurrer to the challenge to the array should have been overruled, and the array quashed; for then it was the prisoner's right to have the statutory regulations complied with, independent of any suggestion of fraud or of misconduct, other than a failure to observe the statutory regulations. If, however, the purpose of the regulations was merely to secure a fair and impartial distribution of the jury duty among the citizens at large, then, in the absence of any suggestion of fraud or of misconduct, other than the mere failure to observe the regulations, it appears to me that the public only can complain of the disregard of the regulations. I am inclined to adopt the latter view, though with a good deal of hesitation.

A more thorough examination of the history of the common law challenge to the array than I have been able to make, would probably throw much light on the question of the probable purpose of these statutory regulations.

I concur in Judge Leonard's opinion in the case of *Ferrie*, with less hesitation, from the fact that the Court of Appeals will undoubtedly have to pass upon the question in that case or this, perhaps in both.

The other questions in this case appear to me to be free from difficulty.

The juror Davis was challenged on the ground that he did not own real estate, and had not been taxed for personal estate. The juror testified that he did not own any real estate; that he owned personal estate, but had never yet been taxed for it, though he expected to be during the

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year. The challenge was overruled, and the juror was sworn as a juror.

The property or assessment qualifications of jurors, prescribed by the Revised Statutes, appear to have been repealed as to the city of New York, by the act of December 15th, 1847. (*Davies' Laws*, 941.) It would seem, then, that the challenge was properly overruled.

Several jurors were challenged for principal cause first, and then for favor, upon the ground that they had formed or expressed an opinion, and upon the triors finding against the challenges, were then challenged peremptorily by the prisoner. The case of *Freeman v. The People* (4 *Denio*, 31) is a sufficient authority for holding that the questions raised previous to the peremptory challenges of these jurors are not open for examination at the instance of the prisoner.

Other jurors (Hadden, Brewster, Wood, Hazen and others) were challenged first, but for principal cause, on the ground that they had formed or expressed an opinion, and upon these challenges being overruled, were then challenged for favor, and upon the triors finding against the challenges, were then sworn as jurors.

I think the case of *Freeman v. The People* (*supra*) is an authority for holding that, as to these jurors, no error was committed, either in overruling the challenge for principal cause, or in the charge of the recorder to the triors. He appears, fairly and properly, to have left the question of bias or indifference, between the people and the prisoner, to the triors.

I think the evidence as to the acts and declarations of the prisoner previous to the homicide, as to the sick dog, two-edged dagger knife, mustard cup, &c., were clearly admissible, as having a bearing on the question of malice or intent.

I can find no error in the charge of the recorder to the jury.

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What he said to the jury as to intoxication as a defense, was in accordance with what I understand to be well settled principles of law.

Upon the whole, I think the conviction should be in all respects affirmed.

[NEW YORK GENERAL TERM, September 18, 1865. *Ingraham, Sutherland and Peckham, Justices.*]

THE PEOPLE, defendants in error, vs. ROGER LAMB, plaintiff in error.(a)

Where, on the trial of an indictment for murder, evidence is offered to show that the prisoner killed the deceased in self defense, and that he feared the deceased intended to attack him, the rule is that the prisoner must have had reasonable ground for believing the deceased intended to take his life, or to do him bodily harm, and that there was reasonable ground for supposing the danger imminent that such design would be accomplished, although it should afterwards appear that no such design existed—that there was no real danger of its being perpetrated.

It is not material whether the prisoner's impressions were correct or not; but the true inquiry is whether he had reasonable grounds to suppose he was in danger, and, if such grounds existed, whether the danger was imminent, or whether he could have avoided the danger by departing.

The rule does not permit a jury to convict if they find the prisoner was not justified in forming such an opinion; nor if they are satisfied that the circumstances did not warrant the conclusion; nor if the impressions which the prisoner formed were incorrect.

Their attention should be directed to the inquiry whether the prisoner had any reasonable grounds for forming such an opinion. If he had; then whether the prisoner was justified in forming such an opinion, and whether the impressions formed were correct, would be immaterial.

A charge to the jury that if the prisoner's impressions, as to the existence of danger to himself, were correct, they were a protection, but that if incorrect they afforded him no immunity or protection, was *held* to be erroneous, as it might have led the jury to suppose, if the opinion or impressions formed by the prisoner were wrong, and that he was *not in reality* in danger of some great bodily injury, that his impressions would afford him no protection.

(a) Affirmed in the Court of Appeals. See 2 *Abb. N. S.* 148.

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On a trial for murder, in the absence of any evidence that the deceased had assaulted the prisoner, evidence to show that the deceased was of a quarrelsome, vindictive and brutal character, is inadmissible. *Per SUTHERLAND, J.*

W RIT of error to the New York general sessions. The plaintiff in error was indicted in the general sessions, in February, 1865, for the murder of his wife, Johanna Lamb. The case was tried in that court on the 20th day of March, 1865, and resulted in a verdict of murder in the first degree. Upon the trial it appeared that the prisoner and his wife resided in the basement of a tenement house at 24 Oak street. The prisoner and deceased appear, from the evidence, to have been living on bad terms. Upon the evening of the 11th of February, 1865, upon the return of the prisoner and his wife home, they had an altercation, the precise nature of which none of the witnesses for the prosecution appear able to state. There was much conflict of testimony as to the progress of the difficulty. It however resulted in the infliction by the prisoner of a wound about half an inch long and an inch and a half deep upon the neck of his wife, severing the carotid artery, causing hemorrhage, from which death resulted. The weapon used was a black-handled pen-knife. The defense interposed was that of self defense. It was shown in the prisoner's behalf that a direct and violent assault, in the same quarrel which resulted in her death, was made by the deceased upon the prisoner, and that she told him she would murder him if he did not go out of her sight; that she was in the habit of wishing every morning that the prisoner might die before night; that she was in the habit of carrying a pen-knife in her pocket, and often threatened to kill the prisoner. It was shown, without contradiction, that the prisoner was a peaceable and quiet man; and it was admitted that he was a consumptive, and in feeble health. The deceased was a strong woman, about 32

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years of age, and inclined to be very muscular; and it appears that in their previous quarrels she (deceased) was the smarter of the two. The prisoner offered to prove that the general character of the deceased was that of a quarrelsome, fighting, vindictive and brutal nature, and that these characteristics were within his (prisoner's) knowledge. The district attorney objected to the admission of any testimony as to the character of the deceased, and the court sustained the objection, and refused to allow the same to be given in evidence; to which decision the counsel for the prisoner excepted.

Wm. F. Kintsing, Jr., for the plaintiff in error. I. The court below erred in refusing to permit the prisoner to prove the quarrelsome, fighting, vindictive and brutal character of the deceased, and that he knew her character. After the prosecution closed the prisoner called on Ann Booth as a witness, and offered to prove that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and brutal character, and that the defendant knew it. The court refused to allow the above mentioned facts, or any of them, to be proved, to which the counsel for the prisoner duly excepted. Other witnesses were also called to prove the same fact, but the court made the same ruling. Counsel for the prisoner took a similar exception. 1. The case presented to the jury one of those cases in which it becomes necessary for them to to pass upon the veracity of witnesses; in so doing they are to form their conclusions not only from the personal appearance of the witnesses, but also from the probability and improbability of their stories. In this view of the case the characters of the two parties to the transactions become of the utmost importance, to show by whom the quarrel probably was originally commenced, and the parts each respectively took in it. (2 *Hale's Crim. Law*, p. 146. *Will's Cr. Ev.* p. 10 *et seq.* 3 *Grah. & Wat. on New Trial*,

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p. 1275 et seq. and cases cited. *Woodin v. People*, 1 *Park. Crim. Cases*, 464.) 2. In a case where the evidence shows that there was an assault committed or threatened by the deceased upon the prisoner, and there is a doubt as to whether the homicide was perpetrated from malice or to repel such assault, and from a principle of self defense, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated; and, in this view of the case, evidence that the deceased was, to the knowledge of the prisoner, of a fighting, quarrelsome and vindictive character, was improperly excluded, as the same tended to show the grounds the prisoner had for apprehending great bodily harm, especially when the prisoner was in a feeble and delicate state of health. (*Reynolds v. The People*, 17 *Abb. Pr.* 413. *Whart. Am. Cr. Law*, § 641, 5th ed. *Whart. on Homicide*, p. 249. *Com. v. Siebert*, *Id.* 227, 228. *People v. Pfomer*, 4 *Park. Cr. Rep.* 558. *State v. Tackett*, 1 *Hawks*, 210. *Queensbury v. State*, 3 *Stew. & Port.* 308. *Monroe v. State*, 5 *Ga. Rep.* 85. *Pritchett v. State*, 22 *Ala. Rep.* 39. *Franklin v. State*, 29 *id.* 14. *Keener v. State*, 18 *Ga. Rep.* 194. *Dukes v. State*, 11 *Ind. Rep.* 557. *State v. Hicks*, 27 *Mo. Rep.* 588. *Payne v. Com.*, 1 *Metc. Ky. Rep.* 370. *State v. Tilly*, 3 *Ire-dell*, 424. *Campbell v. People*, 16 *Ill. Rep.* 18.) 3. The defense in this case being that of self defense, or that the offense, if any, was of no higher grade than that of third degree manslaughter, the evidence excluded was relevant and important, as tending to show the probability of a sudden quarrel, or the fact of reasonable ground of apprehension on the part of the prisoner of a personal injury. (See cases cited under point I, sub. 2.)

II. The court below erred in charging the jury that "the law presumes malice from the mere act of killing." There is no such presumption, when the facts connected with the killing are before the jury; and they cannot infer any malice, unless the act be shown to have been

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committed in a cruel or intentional manner. (*Whart. Am. Cr. Law*, § 709, 5th ed. *Whart. on Hom. p. 34 and note. Com. v. Webster*, 5 *Cush.* 320. *Com. v. Hawkins*, 3 *Gray*, 463. *Com. v. York*, 9 *Metc.* 93.)

III. The court below erred in charging the jury that "it is not his impressions alone, but the question is whether those impressions, at the time he formed them, were correct; if they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." If life is taken by one, under the impression that it was the intent of the deceased to do him some great bodily harm, and there is reasonable ground for believing the danger imminent, and that such design will be accomplished, it is a protection, although those impressions should afterwards turn out to be incorrect. (2 *Edm. B. S. p.* 680. *Shorter v. People*, 2 *Comst.* 193. *Com. v. Selfridge*, reported in *Whart. Hom. p.* 455. *People v. Rector*, 19 *Wend.* 569. *Levet's case*, 1 *East's P. C.* 274. *Wm. Hawksworth*, 1 *Hale's P. C.* 40. *Peterborough's case*, *Id.* 40.)

IV. The court below erred in refusing to charge the jury, as requested by the counsel, "that if the jury have a reasonable doubt, from the evidence, as to what degree of guilt to convict, it is their duty to convict of the lesser degree." The court said, "that is a matter purely for your determination. If you are not satisfied that he intended the act, as I said before, you can find him guilty of either of the lesser degrees." It is not discretionary with the jury as to what degree of guilt to convict; if there are doubts as to the degree, they are "bound" to find the lesser degree. (*Whart. Am. Cr. Law*, § 710, 5th ed. 2 *Russ. on Crimes*, 731. *Com. v. Hawkins*, 3 *Gray*, 463. *Mitchel v. State*, 5 *Yerg.* 000. *Davis v. State*, 10 *Ga. Rep.* 000. *State v. Turner, Wright*, 20. *Com. v. Hill*, 2 *Grat.* 594. *State v. Coffee*, 3 *Yerg.* 283. *People v. Milgate*, 15 *Cal. Rep.* 127.)

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A. Oakley Hall, (district attorney,) for the people. I. The testimony of officer Heape was admissible. 1. That which an accused *says*, is sometimes excluded by reason of a presumed coercion that may affect his truthfulness. That which he *does*, is never excluded; because the physical deed destroys the idea of possible falsity. (*Duffy v. People*, 26 N. Y. Rep. 590, 591.) 2. Besides, the evidence thus introduced, tending to show that the knife obtained by the officer was the homicidal weapon, became unprejudicial. The defense admitted the killing with the knife.

II. Evidence of the general character of deceased was inadmissible. (1 *Whart. Cr. Law*, 641.)

III. The charge of the court was in every respect legally just to the prisoner.

INGRAHAM, P. J. When the evidence is offered to show that the prisoner killed the deceased in self defense, and that he feared the deceased intended to attack him, the rule is that the prisoner must have had reasonable ground for believing the deceased intended to take his life or to do him bodily harm, and that there was reasonable ground for supposing the danger imminent that such design would be accomplished, although it should afterwards appear that no such design existed—that there was no real danger of its being perpetrated. (*See various authorities in Pfomer v. The People*, 4 Park. C. R. 558.)

The city judge charged, "If he thinks his life is in imminent peril, he has a right to act upon that thought and take life; but if he does it, it is at the risk of a jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If you are satisfied from the evidence that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and you have a right to convict. It is not his impressions alone, but the question is whether those impressions were correct. If they were

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correct, it is a protection. If they were incorrect, then it affords him no immunity or protection." As I understand the rule, it is not material whether the impressions were correct or not; but the true inquiry is whether the prisoner had reasonable grounds to suppose he was in danger; and, if such grounds existed, whether the danger was imminent, or whether he could have avoided the danger by departing. It did not permit a jury to convict if they should find he was not justified in forming such an opinion; nor if they were satisfied that the circumstances did not warrant the conclusion; nor if the impressions which the prisoner formed were incorrect. Their attention should have been directed to the inquiry whether the prisoner had any reasonable grounds for forming such an opinion. If he had, then whether the prisoner was justified in forming such an opinion, and whether the impressions formed were correct, would be immaterial.

I cannot avoid the conclusion that the latter part of these instructions may have led the jury to suppose if the opinion or impressions formed by the prisoner were wrong, and that he was *not in reality* in danger of some great bodily injury, that his impressions would afford him no protection.

The question of justification in forming such opinions is not properly for the jury; but the true question is whether there were reasonable grounds for thinking so; whether the conclusion was true or not. If he had no reasonable grounds for forming such an opinion, he was not protected; but if he had such reasonable grounds, then, although such impressions were incorrect, he was excused.

It is true that subsequently, when requested to charge in the words of the statute, that if the jury believed that when the prisoner struck the blow, he had a reasonable ground to apprehend a design to do him some bodily harm &c., then he was justified in striking the blow, and it was their duty to acquit, he replied, "I have charged already

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in that way." Such a remark, however, can hardly be said to be an instruction to the jury. It is rather an answer to counsel, to a request made of the court, and cannot be considered sufficient to remove the impression which the previous remarks made directly to the jury must have made.

I think the judgment should be reversed, and a new trial ordered.

LEONARD, J., concurred.

SUTHERLAND, J., (dissenting.) The prisoner was indicted for the murder of his wife, by stabbing her in the neck with a knife.

On the trial, after the evidence on the part of the people had been given, the prisoner's counsel offered to prove that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and brutal nature, and that the prisoner knew it, and that the deceased was of great strength.

The evidence as to general character, being objected to, was excluded by the city judge. The prisoner's counsel then offered to show that the deceased was of a quarrelsome, vindictive and brutal character. This evidence was also objected to and excluded by the city judge.

I think the evidence as to general character and as to character was properly excluded, for the simple reason that if the evidence had been received, it would not have justified or tended to justify the commission of the alleged act or crime for which the prisoner was being tried. When this evidence was offered, there was no evidence tending to show that the deceased, on the occasion when she lost her life, assaulted the prisoner; on the contrary, the evidence which had been given on the part of the people tended to shew conclusively that she did not on that occa-

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sion assault him, but that he did assault her, first with a stick, and his hands, and then with the knife.

The case of *Reynolds v. The People* (17 Abb. 413) could not properly be referred to as an authority to show that the evidence as to the character of the deceased in this case should have been received; for in the first place, the court did not decide, or intend to decide, in that case, that the evidence to show that Mathews, the deceased, was a dangerous, violent and quarrelsome man, would have been admissible had it appeared that the prisoner was acquainted with him and his character. In the opinion it was remarked that perhaps if this had appeared, the evidence would have been admissible; but the court had no occasion to decide whether it would or would not, and certainly the court would not have held it to have been admissible, under any circumstances, without further examination. Again, the offer in the case of *Reynolds* was to show that he was a dangerous, violent, quarrelsome man, and the offer was made under very different circumstances. My recollection is, that the affray in which Mathews lost his life took place suddenly, on a public highway, after dark, and that when the offer was made, the evidence tended to show that Mathews and his party were the attacking party.

Moreover, the formal ruling of the city judge on the question of evidence as to character of the deceased, in the principal case, could not have prejudiced the prisoner, for he was permitted to prove, and did prove, that his wife was a woman of great muscular strength, and had been in the habit of quarreling with him, and upon several occasions had struck him. Indeed, I think it may be said, though the district attorney repeatedly objected to proof as to the character of the deceased as a quarrelsome, brutal woman, yet that her character was in fact as fully proved as though he had made no such objection. It is not probable that the prisoner would have produced any other or

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further evidence as to his wife's character than was given, even if his offers of proof as to character had not been formally overruled.

The exception to the remark of the city judge in his charge, that "the law presumes malice from the mere act of killing," &c., is evidently founded on a misconception of the purpose of the city judge in making the remark. He did not intend that the jury should understand from the remark, that in this case, after all the proofs were in, the law presumed malice from the mere act of killing. Looking at the remark in connection with what he had said previously, and with what he said immediately after, it is evident that the jury could not have been misled by the remark. In making the remark he stated a mere abstract principle of common law, and his object in stating it was to show the jury that it was a question for them, under the evidence in the case, whether the legal presumption from the mere act of killing had been removed by the evidence in the case.

The question whether the act of killing, which the prisoner confessedly did commit, was, under the evidence, murder in the first or second degree, or manslaughter, or excusable or justifiable homicide, I think was fairly submitted to the jury.

Upon the theory that the jury might come to the conclusion that Mary Driskol, one of the prisoner's witnesses, in stating that the deceased struck the prisoner with a poker before he gave her the fatal blow, testified to the truth, the city judge charged the jury, in substance, that it was for them to say whether the prisoner was justified in believing or forming the opinion that his life was in danger; that the question was not as to what his impressions were in fact, as to his life being in danger, but whether the evidence showed that he was justified in having such impressions—whether the impressions were correct. Now, though I think it must be conceded that the distinction

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taken between what the prisoner thought, and what he was justified in thinking, was impracticable and useless, (for how could the jury find from the evidence that the prisoner thought his life to be in danger, without finding that he was justified in thinking his life to be in danger?) yet I think the jury must have understood the whole charge on this point to be, in substance, that if they believed Mary Driskol, it was for them to say, under the evidence, whether the prisoner was justified in thinking that it was necessary to take the life of his wife to protect his own, or to protect himself from some great bodily injury.

The court was asked by the prisoner's counsel to charge the jury "that if the jury have a reasonable doubt, from the evidence, as to what degree of guilt to convict, it was their duty to convict of the lesser degree." The court did not charge this in words, but said to the jury, "that is a matter for your determination. If you are not satisfied that he intended the act, as I said before, you can find him guilty of either of the lesser degrees." I think this was right. It seems to me that it would have been wrong to have charged the jury that it was their duty to convict of the lesser degree, in any view they might take of the case.

Upon the whole, after giving this case that careful examination which its importance demands, I cannot avoid the conclusion that the conviction of the prisoner must be affirmed.

Conviction set aside, and new trial ordered.

[NEW YORK GENERAL TERM, November 7, 1865. *Ingraham, Leonard and Sutherland*, Justices.]

BUELL vs. COLE.

The rule is well settled that one partner cannot sue his copartner, at law, except upon a balance struck, or an express promise, upon a full settlement of the partnership transactions.

A partnership existing between the plaintiff, W., S. and the defendant, under the name and firm of S. & Co., the defendant and S., on the 30th of Nov. 1853, sold their interest in the firm to the plaintiff and W., who agreed to take the same and pay the debts of the firm, provided the assets should be sufficient. At this time the firm was indebted to J. C. in the sum of \$4000, and to W. C. in the sum of \$2520. J. C.'s debt went into judgment, and the plaintiff and W. paid, upon the execution, \$1500. In January, 1857, the plaintiff, S. and W. met, with J. C., and liquidated the sum due to J. C. at \$2760, and it was agreed between the plaintiff, W. and S. and the defendant, that each should pay one quarter of that sum. The defendant not having paid his share of the debt to J. C., it was, in September, 1857, agreed between the partners that S., W. and the plaintiff should each pay one quarter thereof to J. C., (being \$182.58 each,) and that the defendant should give his note to each for one quarter. Accordingly, the defendant made his four notes, for \$182.58 each, one payable to the plaintiff, one to S., one to W. and one to J. C., and delivered them to J. C. to be delivered to the payees when they should each secure one quarter of the sum due to J. C. The plaintiff, S. and W. each secured to J. C. one quarter, and J. C. thereupon delivered to the plaintiff and W. two notes for \$182.58 each, being the notes sued on.

The debt due from the firm to W. C. went into judgments, which, on the 9th of August, 1855, amounted to \$2894.60. S., the plaintiff, W. and the defendant thereupon agreed with each other, for the purpose of getting time, to put the amount of the judgments into five notes, each agreeing to pay one quarter of each note, as it fell due. Five notes were accordingly executed and delivered to W. C., the first two of which were paid by the parties, as agreed, and the last three were paid by the plaintiff, S. and W. The plaintiff paid one quarter thereof, for the defendant, which the latter afterwards promised to repay him, and W. paid for the defendant the same amount, and afterwards assigned to the plaintiff his note and the claim for the money thus advanced for the defendant. There never was any accounting, or settlement of the partnership matters, between the parties, and the plaintiff and W. had not accounted for the effects of the firm which passed into their hands.

Held 1. That the contract between the parties, dated November 30, 1853, dissolved the copartnership of S. & Co., and by force of it the assets of the firm passed to the plaintiff and W., who were bound thereafter to pay and satisfy the debts of the firm, provided the assets transferred to them were sufficient for that purpose.

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2. That the debts due to J. C. and W. C. being confessedly the proper debts of the firm of S. & Co., as between the plaintiff and W., and S. and the defendant, the two former became, thereafter, the principal debtors, and S. and the defendant sureties for the payment of the said debts, to the extent of the value or amount of the partnership assets received by the plaintiff and W. on the dissolution of the firm.
3. That, as between themselves, the only claim which the plaintiff and W. could thereafter make against their late partners, was that they should contribute ratably to the payment of such or so much of the partnership debts as should remain unpaid, after all the partnership assets received by them under the agreement had been fully exhausted and applied upon such debts.
- 4.. That the notes so given by the defendant and S. to the plaintiff and W. were, in legal effect, simply accommodation notes, representing no debt or liability from the makers to the plaintiff and W., but were mere obligations of the sureties, in the hands of the principal debtors, for a debt which such principals were themselves bound to pay.
5. That the notes, not being given upon any settlement among the partners, or upon any adjustment of their accounts as between themselves, and there having been no settlement of the partnership accounts, no balance struck, and no promises to pay, they were not legal liabilities as between the partners themselves, and could not be enforced in their hands, as against each other, at law; and the plaintiff could maintain no action on them, or any of them, at law; his only remedy against the defendant being in equity, for the payment of his proportion of any deficiency which might be found due to him after the partnership assets were exhausted.

APPEAL by the defendant from a judgment entered upon the report of a referee.

The action was brought to recover on a note made by the defendant to the plaintiff, and on a note of the defendant's, payable to O. P. Wolcott, and for money paid by the plaintiff for the defendant, and money paid by O. P. Wolcott for the defendant, the note to Wolcott, and the demand for money paid by him, having been assigned to the plaintiff. The answer contained a general denial, a counterclaim, and, among other things, alleged that the demands, which the plaintiff was seeking to recover, were the debts and demands due and owing by the firm of A. H. Savage & Co., composed of the plaintiff, defendant, O. P. Wolcott and A. H. Savage. And that the plaintiff and Wolcott purchased the interest of the defendant and Savage, in

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said firm, and agreed to pay the debts of the firm. That there never had been any accounting or settlement of the business of said firm. The action was referred to D. J. Sunderlin, to hear and determine, and was tried 6th October, 1863.

The referee, after hearing the proof, found, among other things, the following facts: That a copartnership was formed in 1851 between the plaintiff, Oliver P. Wolcott, A. H. Savage and the defendant. That on the 30th November, 1853, Savage and the defendant sold their interest in said firm to the plaintiff and Wolcott, they agreeing to take the same and pay the debts of the firm, provided the assets should be sufficient. That before the said sale and purchase, the firm became indebted to J. L. Cleveland in about the sum of \$4000, and to Wm. H. Cheney in about the sum of \$2520. That the debt to Cleveland went into judgment, prior to 19th September, 1854. That execution was issued thereon, 19th September, 1854, after which Buell and Wolcott paid on the same \$1500. That Savage, Buell and Wolcott met with Cleveland at Wolcott's, on the 5th January, 1857, with knowledge of the defendant, and liquidated the sum due Cleveland, at \$2760. That it was then and there agreed between Buell, Wolcott, Cole and Savage, that each should pay one quarter of the debt due Cleveland, and that such quarter should become their individual debt. That on the 26th September, 1857, the defendant, not having paid his share of said debt to Cleveland, the copartners had a meeting, it being ascertained that the defendant had not paid his quarter, and that said quarter amounted to \$730.32. It was there agreed that Savage, Wolcott and Buell should each pay one quarter thereof to Cleveland, being \$182.58 each; and that Cole should give his note to each for \$182.58. Subsequently, Buell and Wolcott paid each a quarter thereof to Cleveland. That pursuant to said agreement, on the 27th September, 1857, the defendant made

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his four notes for \$182.58 each, and delivered them to Cleveland, to be delivered to the payees, when they should each secure the quarter of the \$730.32 to Cleveland. That on the 27th September, 1857, Savage, Buell and Wolcott secured to Cleveland the one quarter. Cleveland thereupon delivered to the plaintiff and Wolcott the notes mentioned in the complaint. That prior to the 9th August, 1855, the debt due from the firm to Cheney went into judgments, which, on the 9th August, 1855, amounted to \$2894.60. That Savage, Cole, Buell and Wolcott agreed with each other, for the purpose of getting time, to put the amount of the judgment into five notes, each agreeing with the other to pay one quarter of each note as it fell due. That the five notes were executed and delivered to Cheney. The first two were paid by the parties, as agreed, and the three last were paid by Savage, Wolcott and Buell. That when the three last notes fell due respectively, the plaintiff paid one quarter thereof for the defendant, which the defendant afterwards promised to repay him. That Wolcott paid the same sum as the plaintiff, for the defendant, to which the defendant made no objection. That Wolcott assigned his note and claim for money paid, to the plaintiff, on 26th June, 1862. That there never had been any accounting or settlement of the partnership matters between the parties. That the plaintiff and Wolcott had not accounted for the effects of the firm, which passed into their hands, under the agreement of the 30th November, 1853. That the debt due and owing Cleveland, and the debt due Cheney, were a portion of the debts of the firm, the payment of which was provided for by the agreement of 30th November, 1853.

As a conclusion of law, the referee found that the defendant was indebted to the plaintiff in the amounts of the two notes mentioned in the complaint, and for the money paid by the plaintiff and Wolcott on the notes

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given to Cheney, in the sum of \$992.08, and that the plaintiff was entitled to a judgment therefor.

On the hearing the defendant objected to the plaintiff's proving any agreement between the parties, as to what part each should pay, of the notes to Cheney. The objection was overruled and the evidence received, to which the defendant excepted. The defendant offered to prove the facts alleged in his fourth and fifth answers, to which the plaintiff objected. The objection was sustained and the evidence excluded, to which the defendant excepted.

The defendant also offered to prove that the property and effects of the firm, which went into the hands of the plaintiff under the agreement of the 30th November, 1853, were more than sufficient to pay the debts of the firm, including the debts to Cleveland and Cheney, which was objected to by the plaintiff. The objection was sustained and the evidence excluded, to which the defendant excepted.

Upon filing the report, judgment was entered against the defendant, in favor of the plaintiff, for \$992.08 debt, and \$108.61 costs. The defendant made a case containing the evidence, facts found and the exceptions by the defendant, and appealed to this court.

D. B. Prosser, for the appellant. I. The referee erred in excluding the offer, on the part of the defendant, to prove that at the time of the sale by the defendant and Savage, to Buell and Wolcott, an estimate was made of the liabilities of the firm, which went into the hands of the plaintiff and Wolcott, and that such assets exceeded the debts and liabilities of the firm several hundred dollars. The evidence, if it had been received, tended to prove the allegations in the 4th and 5th answers of the defendant, which, if sustained, would have constituted a good defense to the action. Under the agreement of the

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30th of November, 1853, the plaintiff and Wolcott were bound to pay the debts of the firm, if the assets were sufficient. The sufficiency of such assets being once established, no promise or agreement on the part of the defendant would release or excuse Buell and Wolcott from the payment of the debts of the firm, unless founded upon some new and valid consideration, and there is no pretense that there was any such consideration for the promise on the part of the defendant.

II. The referee erred in excluding the offer of the defendant to prove "that the property and effects of the firm, which went into the hands of Buell and Wolcott under the agreement of 30th November, were more than sufficient to pay the debts and liabilities of the firm, including the debts of Cleveland and Cheney. The facts offered in evidence constituted a valid defense to the action. Why should the plaintiff be permitted to recover on the account of the payment of a debt which he had agreed to pay upon a good and valid consideration? It was his own debt, and the promise of the defendant was without any legal or moral consideration to support it.

III. The eleventh finding of fact is wholly unsupported by the evidence, and in conflict with the fact found by the referee, that the debt to Cheney was a debt of the firm of A. H. Savage & Co. The referee finds that the several sums mentioned in the eleventh finding were paid by the plaintiff for the defendant. The fact being established that the debt to Cheney was a debt of the firm, the payment thereof could not be for the defendant. It was not his debt, and there is no pretense that he even requested the plaintiff to pay the same; on the contrary, it was the plaintiff's own debt, and he paid the same for himself, because he was legally bound so to do. The debt to Cheney could only be made the debt of the defendant upon his assuming and agreeing to pay the same, upon a valid consideration, and there is no evidence of any such consideration.

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And the defendant denies that he ever agreed to pay the same. The twelfth finding stands upon the same evidence as the eleventh. The remarks upon that finding will apply equally thereto.

IV. The referee erred in his conclusion of law upon the facts found by him. He finds that the debt to Cleveland and the debt to Cheney were the debts of the firm of A. H. Savage & Co., and that there had been no settlement or accounting in relation to the business of the firm. That the defendant and Savage sold out their interest in the effects of the firm to Buell and Wolcott, they agreeing to take the same and pay the debts of the firm, provided the assets should be sufficient. Under the agreement found by the referee the plaintiff and Wolcott became the principal debtors, the defendant and Savage, as to them, sustaining the relation of surety. Before either the plaintiff or Wolcott could call upon Savage or the defendant to contribute any thing towards the payment of the debts of the firm, they must show that the assets were not sufficient to pay the debts of the firm. It is well settled that one partner cannot maintain an action in the nature of assumpsit against his copartner, on account of the payment of a debt for which both were liable as partners, until after a settlement and a balance struck, with an agreement to pay. (*Murray v. Bogert*, 14 John. 318. *Westerlo v. Evertson*, 1 Wend. 532. *Pattison v. Blanchard*, 6 Barb. 537.) Here it is found that there had been no settlement of the partnership accounts. Until that takes place, it cannot be determined whether there is any thing to be paid by the defendant. The finding of the referee, of the agreement of the defendant to pay one quarter of the debt to Cheney, is not sufficient to justify the conclusion of law by him, there being no consideration for the agreement; and there is not any thing in the findings or in the evidence, from which any consideration can be inferred, sustaining the agreement of the defendant to pay

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a part of the Cheney debt. Under the agreement found by the referee, on the part of the plaintiff and Wolcott, they were legally bound to pay Cleveland and Cheney. Their agreement was upon a good and valid consideration; they were bound to faithfully apply the effects which passed into their hands in payment of the debts of the firm; it was their duty to convert the same into money and pay the debts; the property was pledged for the payment of the debts; Buell and Wolcott were mere trustees to apply the same in discharge of the liabilities of the firm; they had no right to use the same in continuing the business, as found by the referee.

C. G. Judd, for the respondent. Before any one of the exceptions of the defendant were taken, the defendant proved and read in evidence the agreement of sale in writing, whereby the defendant and A. H. Savage, two of the members of the partnership firm of A. H. Savage & Co., sold and conveyed to the plaintiff and O. P. Wolcott all their interest in and to the property and effects of that firm; the plaintiff and Wolcott, in the same instrument, agreeing to pay the debts of the firm, provided such assets were sufficient for that purpose; which agreement in writing was made Nov. 30, 1853. By this proof, which the defendant fully relied upon, and nowhere in the course of the trial attempted to question or controvert, the plaintiff claims that the defendant established, as a part of his case, such sale and transfer of all the interest of the defendant and Savage in the partnership property and effects, and must consequently abide by the legal effect and incidents of that transaction. By that sale and transfer the plaintiff claims the said partnership firm was wholly dissolved, and from thence hitherto the several members thereof, so far as that partnership is concerned, as between themselves at least, have had no partnership relations of any kind, being, in the language of Chancellor Kent,

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"distinct persons;" and after that time the business was carried on by Buell and Wolcott. (3 *Kent's Com.*, *Lec.* 43, III (7,) *pp.* 52, 63. *Story on Part.* §§ 272, 321, 328, 329. 17 *John.* 525. 6 *id.* 144. 4 *Barn. & Adol.* 175. *Geortner v. Trustees of Canajoharie*, 2 *Barb.* 628. *Cochrane v. Perry*, 8 *Watts & Serg.* 262.) Instead of his former rights as partner, after this sale, the defendant had no rights or claims against the plaintiff or against him and Wolcott, in relation to the partnership property or business, except such as were secured to him by said agreement in writing, and by that alone. (*Smith v. Howard*, 20 *How.* 121, 124. *Story on Part.* §§ 328, 326 *note* 1, 358, 359. *Gow on Part. ch.* 5, §§ 1, 3, *pp.* 227, 228, 305, 308.) And the several individuals who had thus been parties, in making any agreement among themselves, or executing any note or notes, could and did act only as "distinct persons," and without any other relations than such as were created by such agreement, and note or notes. It was therefore competent for the plaintiff, the defendant, Savage and Wolcott to make the agreements which the referee thus found they did make in relation to the payment of their original indebtedness, in any proportions by each or either as they pleased, and be bound thereby, the same in all respects as if they never had been partners, and as if the indebtedness had not been that of the partnership originally. The defendant was not entitled to inquire after the disposition of the assets of the firm after the transfer to Buell and Wolcott, because, 1. The agreement did not require those assets to be applied to the payment of the partnership debts. 2. The defendant, by making the two notes to Buell and Wolcott, respectively, after the dissolution of the firm, took them and the amounts of them, respectively, out of the partnership business, and made it simply his individual liability, upon a sufficient consideration; that is, the payment of moneys for him by the payees. Upon the same principle, the making of the notes

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to Cheney, after the dissolution, made them the joint and several promises of the makers, the same as if the partnership had never existed; and it was not necessary to prove the additional verbal agreements between the parties in accordance with the legal effect of those notes, and by the express mutual agreement of the four former partners. These matters were taken out of the partnership business. 3. Again, such accounting could not be had in this action for want of the proper parties. Wolcott and Savage were necessary parties to such accounting, but they were not parties to this action. 4. The defendant was estopped from having such accounting, even if the proper parties had been before the court, by his executing and delivering those several promissory notes to the plaintiffs, Wolcott and Cheney, the purpose of such accounting being inconsistent with those acts, and also tending to vary and contradict the writings. The defendant was not at liberty to contradict the presumption arising from the giving of those notes, that there were no assets applicable to the payment of any of those demands, since no fraud or mistake is alleged; nor to contradict the legal effect of his express parol promises. The proof of the declarations of Cleveland, accompanying the act of the delivery of the two notes to Buell and Wolcott as well as to Savage, was properly received, such declarations being clearly a part of the transaction, and giving character to the act—a part of the *res gestæ*. It was not necessary, for the purpose of sustaining this action, to prove an express promise by the defendant to pay, since the implied promise arising from his acts after the dissolution would make him liable in this action.

By the Court, E. DARWIN SMITH, J. The contract made by the plaintiff and defendant with Wolcott and Savage, dated November 30, 1853, dissolved the copartnership of A. H. Savage & Co. The assets of that firm, by force of

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said agreement, passed to Buell & Wolcott, and they were bound thereafter to pay and satisfy the debts of the firm, provided the assets so transferred to them were sufficient for that purpose. The debts to Cheney and Cleveland, mentioned in the pleadings and in the report of the referee, were confessedly the proper debts of the firm of A. H. Savage & Co. at the time of the dissolution of said firm. It was therefore the duty of the plaintiff and the said Wolcott to pay such debts if the assets of the firm were sufficient for that purpose, and as between themselves and the said Savage and Cole they, the said Buell and Wolcott, became thereafter the principal debtors, and the said Savage and Cole sureties for the payment of the said debts, to the extent of the value or amount of the partnership assets received by the plaintiff and Wolcott on the dissolution of said firm. As between themselves, the only claim which Buell and Wolcott could thereafter make against their late partners was, that they should contribute ratably to the payment of such or so much of the partnership debts as should remain unpaid, after all the partnership assets received by them under the agreement aforesaid had been fully exhausted and applied upon such debts. Cole and Savage were liable only to contribute to make up the deficiency if such partnership assets were insufficient to pay the said partnership debts. When, therefore, the several partners gave their separate notes to Cleveland and Cheney for the amount of their respective debts, the notes so given by the said Savage and Cole, as between themselves and the said Buell and Wolcott, were in legal effect simply accommodation notes lent to the said Buell and Wolcott, provided the latter had sufficient assets of the firm of Savage & Co. in their hands to pay and discharge such debts to Cleveland and Cheney, together with the other debts of said firm. In the hands of the original creditors, Cheney and Cleveland, or of any third person to whom they might have transferred them, they were valid

notes; but in the hands of Buell and Wolcott, they were simply notes given without any consideration until the assets of the firm were exhausted. They represented no debt or liability from Cole and Savage to Buell and Wolcott. They were simply obligations of the sureties in the hands of the principal debtors, representing a debt which such principals were bound to pay off and discharge. Upon what principle the plaintiff can maintain an action on these notes before the partnership assets in his hands are exhausted and found insufficient to pay the said debts to Cleveland and Cheney, I cannot conceive, unless a principal debtor, after having paid his own debt and taken up the securities held therefor, can turn around and maintain an action on such securities against his own surety, to recover the amount so paid. If these views are correct in respect to the relative rights of the several members of the firm of A. H. Savage & Co. as against each other, it follows, I think, that the several findings of the referee excepted to on the trial excluding evidence tending to establish the fourth and fifth answers of the defendants, were erroneous. Those answers set up a complete equitable defense to the plaintiff's action. The possession of these notes of the defendants, *prima facie*, entitled the plaintiff to recover. But the defendant was clearly entitled to show that as between himself and the plaintiff these notes were given without consideration, and to secure a debt which the plaintiff himself was primarily bound to pay. He was entitled to show the facts set up in his two answers, the fourth and fifth.

All the exceptions, and there are quite a number, to decisions excluding evidence tending to prove such answers, I think well taken. A party now is entitled to set up an equitable defense, and it is just as available as a legal defense. I have no doubt that before the Code a court of equity, upon a proper bill filed for that purpose, would have restrained the action by the plaintiff upon the notes

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aforesaid, and for the moneys paid by him upon the Cheney and Cleveland debt, upon the allegations contained in these answers. The answers do in effect allege that these notes have been paid by the plaintiff and Wolcott who were the primary debtors, for the payment thereof. The defendant offered to prove that the plaintiff received under the agreement of November, 1853, and had in his hands, more than sufficient of the assets of the late firm of A. H. Savage & Co. to pay said notes and moneys, together with the other debts of said firm. Certainly this was admissible, and would have established, I think, a complete defense to the suit. The plaintiff might perhaps be allowed to retain these notes till he had exhausted such assets. The answer of the defendant concludes with a prayer for affirmative relief that the plaintiff account for the property and effects of said firm of A. H. Savage & Co. which had come to his hands, and that the two promissory notes mentioned in the complaint be delivered up, or that they be canceled and destroyed. The partnership was dissolved, and the defendant had relinquished all interest in its assets and had no right to ask for an accounting, because he could recover nothing on such accounting from Buell and Wolcott. Such accounting would be requisite before they could call on Cole and Savage to make up any deficiency, or to pay them any amount over and above the assets of the copartnership which they, or either of them, might have paid to the partnership creditors. For the purpose of such an accounting, Wolcott and Savage would be necessary parties, and such an accounting, therefore, could not be had in this suit, so as to be final and conclusive. But the defendant had a right, as an equitable defense, to show that the plaintiff had paid these notes from the assets of the firm of A. H. Savage & Co. which came to his hands under the agreement of the 30th of November, 1863. So far he had a right to go to make out his defense.

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But this judgment, I think, should be reversed for another reason. Upon the facts found by the referee, I think his conclusions upon the law, that the plaintiff was entitled to recover, erroneous. It seems to me that the plaintiff could no more maintain an action upon these notes, against the defendants, than he could for the account for which said notes were given, independently of the notes. The notes to Cheney and Cleveland were given by the respective parties to get time for the payment of the principal debts, and the time was extended by Cheney and Cleveland upon the receipt of such notes. The notes were not given upon any settlement among the partners, or any adjustment of their accounts as among themselves. There was no settlement of the partnership accounts, no balance struck, and no promises to pay, as between themselves. The notes simply represented their primary liability to their creditors, each note being given for one fourth of the original debt. It is apparent that they were put in this shape so that the original creditors, in giving an extension of the time for the payment of the respective debts, might retain all their security and not release either of their debtors. The notes had no relation to the ultimate claim of the plaintiff and Wolcott upon Cole and Savage, after exhausting the assets in their hands in payment of the partnership debts. The arrangement for the giving of said notes by Cheney and Cleveland was one for their common benefit, and for the especial convenience of the plaintiff and Wolcott, that they might have more time to collect the debts and convert the assets of the copartnership into money; and the notes of \$182 were mere memorandum notes, as between the parties, to preserve their relative rights and liabilities as between themselves. The notes, therefore, were not legal liabilities as between the partners themselves, and could not be enforced in their hands, as against each other, I think, at law. In this view of the object and force of these notes, the plaintiff could main-

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tain no action on them, or any of them, at law. His remedy against the defendant was, in equity, for the payment of his proportion of any deficiency which may be found due to him after the partnership assets are exhausted. The rule is well settled that one partner cannot sue his copartner, at law, except upon a balance struck, or an express promise, upon a full settlement of the partnership transactions. (1 *Wend.* 534. 13 *John.* 402. 18 *id.* 245. 6 *Barb.* 538.)

The judgment, I think, should be reversed and a new trial granted, with costs to abide the event.

[MONROE GENERAL TERM, December 5, 1864. *Waller, J. C. Smith* and *E. D. Smith, Justices.*]

GEORGE WAGNER, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

The good character of a prisoner cannot avail against clear proof of guilt. It is only where doubt exists as to the commission of the crime, and the intent of the party, that good character will protect him.

An indictment charging the crime upon the "oath" of the jurors is sufficient.

Although "oaths" is the proper word, using the singular, instead, is such a defect as, after verdict, will be cured by the statute.

The objection that the crime was not shown to have been committed in the county alleged in the indictment, cannot be taken for the first time upon a writ of error.

So as to the objection that the witnesses do not state the year in which the fatal injury was inflicted, to show that it produced death within a year and a day; where there is sufficient evidence from which, if necessary, the jury could infer the killing to have been in the year alleged in the indictment.

ERROR to the New York general sessions to review a conviction for murder.

By the Court, INGRAHAM, J. This case was submitted to us by the district attorney on his brief. The points have been handed in for the prisoner since the adjournment,

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and I have examined the case attentively, and have found no exceptions taken to the evidence, and only one to the charge. As to that exception, it is sufficient to say that the charge was in accordance with the decision of the Court of Appeals in the *People v. Clark*, and in various cases since in that court, and which have been uniformly followed here. There was no error made in that respect. In looking over the testimony, I see no reason to doubt the correctness of the verdict. The homicide was proved beyond a doubt, and there was no evidence that would have warranted a finding of insanity, unless we adopt the general proposition that every one who unlawfully takes the life of another is insane. There was testimony that when he came in he appeared to be excited, but no such excitement is shown after the deed was committed. The good character shown to belong to the prisoner cannot avail against clear proof of guilt. It is only where doubt exists as to the commission of the crime and the intent of the party, that good character will protect him. Some technical questions have been made by the prisoner's counsel, which remain to be noticed. First, that it does not appear that the grand jury who found the indictment had been sworn previous to their action. In the error-book it is said that it was done by the oath of Charles J. Leonington, foreman, Hector, Armstrong and others. The word oath should have been oaths, and is probably so in the original, and the body of the indictment states that the jurors upon their oath present. This is sufficient. After verdict, such a defect would be cured by the statute. The second objection is, that the witnesses do not state the place of the murder to have been in the city of New York. The testimony is, that the crime was committed at No. 519 Broome street. The answer to this objection is, that it should have been taken on the trial. From the course of examination on the trial, it is apparent that all parties acted on the admission that the murder was in the

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city of New York. Had the objection been made on the trial, it would have been answered at once by a single question to the witness. It is too late now to seek to make such an objection available. The same remark applies to the third objection, viz., that the witnesses do not state the year in which the injury was inflicted, to show that it produced death within a year and a day. The indictment charges the offense to have been committed in July, 1865. The year in which it occurred was not a subject of inquiry by the counsel for the prisoner. There is, however, evidence from which, if necessary, the jury could infer the killing to be in 1865. Krayner was asked by the prisoner's counsel when his relations with the witness ceased, prior to the homicide, to which he replied, the prisoner left his place in February, 1865. It is not, however, at all material, where it is evident that the case was tried on the assumption that the death occurred during the year, and no objection is taken, and no inquiry made by the prisoner's counsel on the subject. It is a well settled rule that a party cannot object to such defects of testimony, if no objection is taken on the trial, because if made then they would at once have been removed by an examination of the witness. There is no good reason stated for interfering with the judgment, and we can see no error committed in the court below calling for a new trial.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 19, 1866. *Geo. G. Barnard, Clerk*
and *Ingraham, Justices.*]

JOHN HACKETT, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

On the trial of an indictment for murder, evidence as to the existence of ill feeling between the prisoner's wife and the wife of the deceased, is not admissible, unless the proof shows that the prisoner had a knowledge of such ill feeling.

If there is no proof of such knowledge, the prisoner's counsel may on that account ask to have such testimony stricken out, and to have the jury instructed to disregard it. And although no such request be made, the evidence will be held to have been improperly received.

Dying declarations relating to the transaction, and circumstances attending the homicide, are admissible on a trial for murder.

So declarations that the prisoner's boys followed the deceased in the street, and clubbed him on the corner, where such act immediately preceded the meeting with the prisoner, and was the cause of his returning to his house, where the blow was struck, are admissible, as being strictly a part of the *res gesta*—the immediate cause which led to the meeting.

But a declaration that the prisoner had often threatened to kill the declarant—such declaration being made after the latter had related the circumstances of the stabbing, and being entirely unconnected with it, without any thing to show whether the threats were made to the declarant, or to others who had told him—is inadmissible.

It would be adopting a dangerous precedent to extend the rule which admits declarations made under a conviction that the party must die, beyond the immediate transactions which led to the death. *Per* INGRAHAM, J.

THE prisoner was convicted of murder in the first degree, for stabbing John Green. Upon the trial, evidence from Mrs. Green was admitted to show indebtedness from the prisoner's wife to the wife of the deceased, and of the existence of ill feeling between them. This was objected to by the prisoner's counsel, and the objection overruled, because the district attorney expected to trace a knowledge of it to the prisoner. The dying declarations of the deceased were admitted. They contained not only an account of the transaction which ended in the death of the deceased, but also other facts, viz., that previous to the occurrence the deceased went out of his house, and the boys of the prisoner followed him and clubbed him, and in consequence thereof he returned to his house,

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where he met Hackett and the stabbing took place. He also stated that Hackett had often threatened to kill him. The prisoner's counsel objected to reading the whole of the declaration, but admitted that a portion of it might be evidence. This objection was overruled, and the whole was read. The prisoner's counsel offered to show acts of violence on the part of the deceased towards the prisoner, tending to endanger his life. This was excluded, and the counsel excepted.

The court was requested to charge the jury that good character was to be considered by the jury with the view of raising a doubt as to the intent of the prisoner. This was refused, and the judge told the jury that a man of good character was less likely to commit a crime than a man of bad character. But that a sudden crime, which is supposed to come from a sudden impulse, is less influenced by character than many other crimes. That if the prisoner was the man who did the deed, he did it under a most unusual impulse.

S. H. Stuart, for the plaintiff in error.

A. Oakley Hall, (district attorney,) for the people.

INGRAHAM, J. When the evidence as to ill feeling between Mrs. Hackett and Mrs. Green was offered and admitted, there was no foundation laid for the admission of it. It was between the parties, and unless the evidence showed that the prisoner had the knowledge of it, it should not have been received. The court so considered; because both the court and district attorney spoke of its being brought home to the prisoner. If it was so received conditionally, then it was a mere discretion as to the order of proof, which is not a matter of exception. But I do not see that any proof was given to show that the prisoner had any such knowledge; and if the prisoner's coun-

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sel. had on that account asked to have it stricken out, and to have the jury instructed to disregard it, the motion should have been granted. Although no such request was made, the evidence, I think, was improperly received.

The objection to the reading of the whole of the dying declaration of the deceased is a question of more difficulty. The necessary evidence to admit such declarations was amply sufficient; and the greater part of those declarations was properly received. All that related to the transaction and circumstances attending the homicide was admissible; but whether the statements of the deceased, as to previous difficulties and threats of the prisoner, can be received is more doubtful.

The rule in the English cases appears to be that such declarations are admitted from the necessity of the case, to prove the *res gestæ*, and the transaction from which the death results. This was so held where it was sought to prove perjury by the dying declarations of the witness who had been murdered; the court holding dying declarations only admissible where death is the subject of the charge, and *where the circumstances of the death are the subject of the declaration*. (*Rex v. Mead*, 2 Barn. & Cress. 605. 4 D. & R. 120.)

A similar rule has been adopted in this country, (*Nelson v. The State*, 7 Humph. 542,) in which case the court says: "It may well be doubted whether the subject matter of the declarations, viz., that the prisoner had two or three times before tried to kill him, would have been competent testimony. Declarations are admitted from the necessity of the case, to identify the prisoner and establish the circumstances of the *res gestæ* or direct transactions, from which the death results. When they relate to former and distinct transactions, they do not seem to come within the principle of necessity. It may be said that a person who is *in articulo mortis*, and therefore supposed to be in a situation in which he would say nothing but the truth,

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might as well be permitted to make such declarations as to previous occurrences as in respect to the immediate cause of his death. But when we remember that this rule has been adopted rather from the necessity of the case, arising from the numerous cases where murder has been committed with no eye to see but that of the murdered man and the murderer; that the circumstances attending the murder were calculated to be more strongly impressed on the mind than others; that no opportunity for cross-examination exists; and that other testimony may be obtained as to previous transactions, we may well doubt the propriety of extending the rule so as to admit dying declarations regarding any thing, or any occurrence, except those immediately connected with the murder. As to all other occurrences, want of recollection, prejudice, passion or other causes may intervene to render the truth of such declarations less certain, and to call more forcibly for an opportunity to cross-examine, in order to ascertain the real facts of the case, and the wisdom of the rule which confines such declarations to immediate circumstances attendant upon the homicide, is apparent.

In this case, the declarations that Hackett's boys followed the deceased and clubbed him on the corner, are objected to. This immediately preceded the meeting with the prisoner, and was the cause of the return to his house, where the blow was struck. It was strictly a part of the *res gestæ*—the immediate cause which led to the meeting—and as such was not subject to objection.

The other matter objected to was the declaration that Hackett had often threatened to kill him. This was made after the deceased had related the circumstances of the stabbing, and was entirely unconnected with it. It does not appear whether the threats had been made to him or to others who had told him, and it is very clearly open to the objections before suggested. Its effect on the jury may have been very injurious. The prisoner was on trial

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for his life, and the whole question whether he could be convicted of murder in the first degree was to be decided by proof of prior ill will, or prior cause for a premeditated act. If it was not premeditated, it would have been a crime of an inferior degree. I do not see, in the case, any evidence, except this, of such previous quarreling. It may be inferred from the evidence that Mrs. Hackett had communicated to him the differences existing between the members of his family and the family of the deceased, but there is no proof that such information was given; and the propriety of admitting evidence of such ill will, without proof that it had come to the knowledge of the prisoner, has already been said to be very questionable. Such a declaration, if received from the deceased, would very strongly impress on the minds of the jury that a cause of quarrel existed between the prisoner and the deceased, and in this way lay the foundation for a verdict of murder, which otherwise might have been only manslaughter.

It seems to me to be adopting a dangerous precedent to extend the rule which admits declarations made under a conviction that the party must die, beyond the immediate transactions which led to the death.

If I am right in these views, the evidence referred to should not have been received, and the judgment should be reversed, and a new trial ordered.

There is also an exception to the charge of the court upon the subject of character. The rule as given by the learned justice was correct, on this point, and the subsequent remarks as to the difference between crimes premeditated and those committed under a sudden impulse did not alter that rule, nor was there any error in those remarks.

The question which was raised on the trial, as to the cause of death, was one of fact. It was peculiarly within the province of the jury to decide it. If the death was accelerated by the wound, even if such wound, under other

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circumstances, might not have been mortal, there can be no doubt but that the prisoner was chargeable with the homicide. The evidence of Dr. Southick was of itself sufficient to sustain the finding of the jury upon this point. There is no ground, on this branch of the case, to interfere with the verdict.

But I think, for the cause before stated, in regard to the dying declarations, an error was committed, and that the judgment should be reversed and a new trial ordered.

GEO. G. BARNARD, J., concurred.

SUTHERLAND, J. While I should have been quite satisfied with a verdict of manslaughter, in this case, I cannot concur in the above grounds for granting a new trial.

New trial granted.

[NEW YORK GENERAL TERM, April 2, 1866. *Geo. G. Barnard, Sutherland and Ingraham*, Justices.]

 GREENWOOD vs. SPRING and others.

A person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one, for the benefit of the other.

A contract made by an individual as the agent of both parties, is not void, but only voidable, at the election of the principal, if he come into court within a reasonable time.

It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. It is at his option to repudiate, or affirm, the contract, irrespective of any proof of actual fraud.

But unless application be made, within a reasonable time, to set it aside, a valid title will pass, if it be upheld by a sufficient consideration and the proper forms have been observed.

If application to set aside such a contract be not made within a reasonable time, the delay will be considered a waiver.

S., being indebted to the plaintiff, the latter applied to him personally for a

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mortgage on certain land, as security for the debt. S. refused to give it. The plaintiff then telegraphed to A. to attach S.'s property for the debt. A. at the time held a power of attorney from S. & K. authorizing him to lease, mortgage, sell and convey any lands or tenements, &c., that they or either of them had, or that they should afterwards become possessed of, within the State of New York; to make, execute and deliver contracts, deeds, &c.; and to collect and receive all debts, dues, &c. Instead of attaching the property of S., as directed by the plaintiff, A., as attorney in fact for S., executed a mortgage upon the property of S., to the plaintiff, for the amount of his debt, and delivered it to his law partner, for the plaintiff, who afterwards accepted it. *Held* that A. being, by the telegram, constituted the agent and attorney of the plaintiff for collecting or securing the particular debt against S., could not, as the attorney in fact of S., execute a mortgage upon S.'s land, to secure the payment of such debt. And that the mortgage was voidable, and must be declared a nullity, unless S. was to be deemed, by his delay, to have waived that defense.

Held, also, that a delay of one year, in setting up the defense, by S., when it was interposed to an action of foreclosure, brought by the mortgagee, was not an unreasonable delay; more especially as the plaintiff parted with no new consideration, and there was no evidence in the case from which the court could infer that he had lost any rights, security, benefit or advantage.

Held, further, that the power to A. did not authorize him to execute a mortgage as security for a debt or liability of his principal then existing.

That the plaintiff was not a *bona fide* holder for value; no new consideration being parted with, by him, as a condition for the mortgage, nor any antecedent debt discharged. That it was simply given as security for a prior indebtedness; and that, too, after a refusal by the principal.

That he held his mortgage as security for an antecedent debt, and took it with full knowledge, as the law presumes, of the nature and extent of the power under which the agent who made it assumed to act; and being beyond the scope of the power, it was void, and could not be enforced.

A PPEAL from a judgment entered in a cause tried before the court, without a jury.

Wm. C. Brown, for the plaintiff.

O. G. Myers, for the defendants.

By the Court, JAMES, J. This was an action to foreclose a mortgage. The defendant Spring was the mortgagor, and the other defendants his judgment creditors. The

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mortgage was made and delivered by A., as the attorney in fact of Spring, in consideration of, and as security for, a prior indebtedness of Spring to the plaintiff. The parties all reside in Boston. The plaintiff applied to Spring, personally, for a mortgage on the lands in question, as security for his debt, which Spring refused. The plaintiff then telegraphed to A. to attach Spring's property for the debt. A. at the time held a power of attorney from I. S. Kelly and Chas. Spring, authorizing him "to lease, mortgage, sell and convey, to any person or persons, either in whole or in part, any lands or tenements, or any interest therein, that they or either of them then had, or that they should afterward become possessed of, within the State of New York, and for them and in their names, or in the name of either of them, to make," &c. Instead of attaching the property of Spring, as directed by Greenwood, A. made the mortgage in question and delivered it to his law partner, for the plaintiff; and the plaintiff, when the same afterward came to his knowledge, accepted it.

It was claimed on the trial below, and so held by the court, that A. was the agent of both parties, and standing in that position he could not execute a mortgage as the attorney of one, for the benefit of the other.

A party who is of capacity sufficient to do an act himself may do it by attorney. Of Spring's capacity no question is made. The authority in this case was under seal.

A contract made by one individual as the agent of both parties is not void, (14 *John*, 418,) but only voidable, at the election of the principal, if he come into court on timely application. (5 *Vesey*, 678. 4 *Cowen*, 718.) The rule seems to be founded on the danger of imposition; and such agreements are regarded as constructively fraudulent. (9 *Paige*, 242.) It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him; it is at his

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option to repudiate, or affirm, the contract, irrespective of any proof of actual fraud. (4 *Kern*. 91.) But unless application be made within a reasonable time to set it aside, a valid title will pass, if it be upheld by a sufficient consideration, and the proper forms have been observed. If application to set it aside be not made within a reasonable time, the delay will be considered a waiver. (4 *Coven*, 718.) It is a defense, too, solely personal to the principal. (5 *Pick*. 519.) Like usury and the statute of limitations, neither trustees, assignees or creditors can avail themselves of such defense.

As between the plaintiff and the defendants, who are creditors, the equities are equal. In this case, however, the principal himself repudiates the mortgage; and if the defense is good as to him, being fatal to the mortgage, it is beneficial to the other defendants.

But the plaintiff insists that A. was not his agent or attorney, nor did he act as such in this transaction; that his instructions were to attach Spring's property, which he wholly disregarded and ignored; that whatever A. did in this matter, he did as the agent of Spring. I am unable to reconcile the facts with any such construction. The telegram constituted A. or his firm the attorneys and agents of Greenwood for the particular debt against Spring; and it was that telegram that caused A. to act in the matter of securing such debt. It was A., the attorney at law, who set A., the attorney in fact, in motion, and produced the mortgage from his principal to his client.

In this view the mortgage was voidable, and must be declared a nullity, unless the defendant Spring, by his delay, be deemed to have waived this defense. The mortgage was made June 15, 1855, and it came to Spring's knowledge the next month. No steps were taken to set it aside. This action was commenced about one year after the date of the mortgage, and then this defense interposed. What is a reasonable time cannot very well be defined,

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nor has any general rule been established. It must, in a great measure, depend upon the exercise of sound discretion by the court, under all the circumstances of each particular case. The master of the rolls, in a case in *Cooper's Ch. Cases*, 207, refused to set aside a purchase by a trustee after a lapse of eighteen years. In *Bryan v. Burnett*, (1 *Caines' Cases*, 1,) the court refused the application after sixteen years' acquiescence. In *Butler v. Haskell*, (1 *S. Car. Rep.* 42,) the court did not consider eleven years an unreasonable delay; and in many cases relief has been granted after a much longer period. (14 *Vesey*, 91, 214. 9 *id.* 292.) From these authorities I cannot say that a delay of one year in a case like this was unreasonable; more especially as the plaintiff parted with no new consideration, and there is no evidence, in the case, from which the court can infer that he has lost any right, security, benefit or advantage.

I am, therefore, of the opinion that this defense of double agency is fatal to the validity of the mortgage.

The defendant further insists that the power to A. did not authorize him to execute a mortgage as security for a debt or liability of his principal. The power contained a full authority "to lease, mortgage, sell and convey any lands, and to make, execute and deliver good and sufficient contracts, deeds and conveyances &c., and to collect and receive all debts, dues, rents, accounts or other demands whatsoever that are or may be owing to us, or either of us, giving and granting unto our said attorney full power," &c. The extent of the power, and the purpose for which it was given, must be determined from the instrument itself. It can neither be enlarged nor restricted by parol. When a power authorizes acts in respect to a particular trade, business or agency, parol evidence of the usages of such trade, business or agency may be received for the purpose of interpreting the powers actually given. But such principle has no application to this case. It related to no particular trade, business or agency. The power to

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mortgage and sell was complete; it included not only the present land of either or both principals, but the after-acquired property of both or either; the quantity to be sold, the price and terms of payment, were left entirely to the judgment and discretion of the agent; but payment was evidently contemplated at some time, and the power conferred upon the agent authority to receive and collect debts that were, or might be, owing to them, or either of them. There is nothing in the power from which it can be inferred that the principals, or either of them, intended to confer upon the agent the authority to secure their indebtedness, or any part of it, at his option, by a sale or mortgage of their property, and the instrument cannot be so construed. Indeed all written powers should receive a strict interpretation, and the authority never be extended beyond its express terms, or what is absolutely necessary for carrying the authority so given into effect. (*Paley on Agency*, 192.) Thus a power to sell, assign and transfer stock, has been held not to include a power to pledge it for the agent's own debt. (5 *Vesey*, 211.) A power of attorney, given by a mill company to their agent to manufacture their logs into lumber, and transport them to market and sell and dispose thereof for the company's benefit, will not authorize the agent, without the knowledge of the directors of the company, to deliver over the lumber at the company's mills, in payment of securities given by the agent, on behalf of the company, in the course of his agency. (1 *Kern*. 327.) So a letter of attorney, empowering an agent to negotiate, compromise, adjust, determine, settle and arrange all differences and disputes between the principal and all persons whatsoever, and to execute and sign, in the name of the principal, any release, covenant or conveyance of any part of the principal's estate, and to give and receive discharges, receipts, &c., has been held not to authorize the agent to confess a judgment in the name of his principal. (1 *Ind. Rep.* 252. *Story on Agency*, §§ 82,

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83, 84.) So in this case the power was to lease, mortgage and sell, giving full power to the agent to manage, control and dispose of the principals' real estate, for their use and benefit; but not for the purpose of securing any one or more of their debts.

But in this case the power to mortgage is given in express terms, and it is only as to the purpose for which the mortgage was given that it is claimed to be unauthorized. It may now be regarded as settled, in this State, even in case of a note made by an agent, that the party receiving it "is bound to look to the power, and in so doing must take notice of its legal effect at his peril; he is bound to see that the attorney does not go beyond his power by making and indorsing notes for the benefit of himself or persons other than his principal." (*Stainer v. Tyson*, 3 *Hill*, 279. *North River Bank v. Aymar*, *Id.* 262; approved, *Farmers and Mechanics' Bank v. Butchers and Drivers' Bank*, 16 *N. Y. Rep.* 125, 139, 143.) "It is a general rule, that when an attorney does any act beyond the scope of his power, it is void as between the appointee and principal. The ground on which the rule rests is this: the appointee need not deal with the attorney unless he choose; if he do, he is bound to inspect the power, and shall be holden to understand its legal effect, and must see at his peril that the attorney do not go beyond it." (3 *Hill*, 266.)

In this case the plaintiff is not a *bona fide* holder for value: no new consideration was parted with by him as a condition for the mortgage; nor was any antecedent debt discharged. It was simply given as a security for a prior indebtedness, and that, too, after a refusal by the principal. The plaintiff is not, therefore, entitled to any consideration as an innocent *bona fide* holder of paper authorized by the principal, but perverted from its original purpose, by the agent. He holds his mortgage as security for an antecedent debt; he took it with full knowledge, as the law pre-

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sumes, of the nature and extent of the power under which the agent who made it assumed to act; and being beyond the scope of the power, it is void, and cannot be enforced.

The judgment must be affirmed.

[SARATOGA GENERAL TERM, July 14, 1857. *C. L. Allen, James and Rosekrans, Justices.*]

JAMES CAMPBELL, appellant, vs. JOHN W. THATCHER and others, executors &c., respondents.

The incidental powers possessed by surrogates' courts previous to the Revised Statutes, and taken away by those statutes, (*Part 3, chap. 2, title 1, § 1,*) were restored by the act of the legislature of 1837, (*Laws of 1837, ch. 490, § 71,*) repealing that section of the Revised Statutes.

Although a surrogate, after parties in interest have been represented at a hearing before him, and final sentence or decree has been given, has no general power of opening or reversing such sentence or decree, on the ground that he erred as to the law, or decided erroneously upon the facts, he may open such decree for the purpose of correcting any mistake therein, the result of accident.

Executors employed counsel to make out their account for settlement, and left with him their vouchers for that purpose. He made up the account, omitting, through oversight, to credit the executors with a payment of \$500. The error was not discovered until the account was presented, and then, believing that the amount would be allowed to them on the balance known to be in their hands, the executors did not ask to have the account corrected, but allowed the error to pass. The surrogate having made a final decree declaring the account finally settled, the amount in the executors' hands, and directing as to its disposition, which decree was duly entered, one of the executors applied to the surrogate, by petition, asking that the decree be opened and he be credited with such payment of \$500, and an error of \$50 which the residuary legatee had consented to allow, and deduct from the amount in the executors' hands. *Held* that the transaction might be treated as a mistake or oversight, coming within the principle laid down in *Sippery v. Baucus*, (24 N. Y. Rep. 46,) and within the incidental powers possessed by surrogates' courts; and that consequently the surrogate did right in opening the decree and correcting the error complained of.

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THIS is an appeal from an order of the surrogate of Montgomery county, opening a decree entered on a final accounting by the defendants, as executors &c. of Archibald Campbell, deceased; and also from so much of the corrected decree as directs that the respondents be credited with the sum of \$500 not allowed in the decree.

The respondents were the executors of the will of said Archibald Campbell. On a citation from the appellant they appeared before the surrogate, on which occasion they presented their accounts, with vouchers, showing a balance in their hands of \$1686.67. On the 10th of February, 1863, the surrogate made a final decree, declaring the account finally settled, the amount in the executors' hands, and directing its disposition, which decree was duly entered.

September 22d, 1863, one of said executors applied to the surrogate, by petition, asking that said decree be opened, and he be credited with a payment of \$500 and an error of \$50. The petition stated an error in such settlement of \$50, which the respondent, sole residuary legatee, consented to allow and deduct from the amount in the executors' hands. The petition further stated, that in making up the account for settlement, there was omitted an item of \$500, paid to the sole residuary legatee June 7th, 1860, for which they held a receipt, and which had not been allowed; that the omission was discovered when the account was presented, but believing it would be allowed them, and credited on any balance found in their hands going to said legatee, they did not deem it necessary to correct it, or present their receipt, until the amount going to said legatee should be determined; that since entering said decree, said legatee has refused to allow said sum of \$500 to be deducted from the amount going to him, but has caused execution to be issued for the full amount of said decree.

In answer to said petition its claim is denied, and it is

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asserted that the \$500 was included in a receipt for \$900 allowed on said settlement.

On March 28th, 1863, the appellant filed and served on the respondent a stipulation in writing, consenting that said decree be modified by allowing the \$50; but no modification was made.

On the 12th of October, 1863, the parties appeared before the surrogate, and the appellant insisted "that the decree having been filed and docketed in the county clerk's office, execution issued thereon and still in the hands of the sheriff, the surrogate had no jurisdiction to entertain an application to open said decree, it being a final decree." The objection was overruled, and an order made opening the decree.

Afterwards a hearing was had upon the fact whether or not the \$500 was included in the \$900 receipt allowed on the former hearing, which was found against the appellant, and December 20th, 1863, a decree was made by said surrogate allowing said sums of \$50 and \$500, and decreeing the balance in the hands of said executors to be \$1136.67, instead of \$1686.67.

D. P. Corey, for the appellant.

S. P. Heath, for the respondents.

By the Court, JAMES, J. It was held by the Court of Appeals, in *Sipperly v. Baucus*, (24 N. Y. Rep. 46,) that the effect of the act of 1837, (*chap.* 460, § 71,) which in part repealed section 1 of part 3, chapter 2, title 1, of the Revised Statutes, was to restore to surrogates' courts all the incidental powers possessed by them previous to the Revised Statutes.

What were the powers of surrogates' courts has been very clearly pointed out by Judge Daly, of the New York common pleas, while acting as surrogate in 1862, in

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a very learned and elaborate opinion delivered in the matter of *Joseph W. Rink*. They were: To take proof of the execution of last wills and testaments, and admit them to probate; to grant letters testamentary and of administration; to swear executors and administrators to the truth of the inventories and accounts exhibited by them; to call administrators to account; to decree the order of distribution after the payment of debts and expenses; to compel administrators to pay the same, and enforce it by execution against the person; to hear and determine any cause touching a legacy or bequest in any last will and testament; to decree the payment of a legacy or bequest, and enforce it; to order the admeasurement of dower upon the application of a widow, or of any heir or guardian of a minor; to order the sale of real estate for the payment of debts when the personal estate is insufficient, and when the real estate is insufficient, to divide the proceeds, after the payment of expenses proportionably among creditors; to confirm all such sales, and direct conveyances to be made by executors or administrators; and to order the mortgaging or leasing of the real estate of any testator or intestate for the same purpose, when infants are interested; to appoint guardians for infants, as fully as the chancellor might do; to record all wills proved before them with the proof thereof, letters testamentary and of administration granted by them, with all things concerning the same, all orders or decrees made by them for the sale of real estate, and all instruments, writings or documents, of a like nature left unrecorded by their predecessors, and to complete the unfinished business of their predecessors; to institute inquiry respecting the personal estates of intestates not delivered to the public administrator, nor accounted for lawfully by persons into whose hands it is supposed to have fallen; to compel the attendance of witnesses, the production of wills, documents or writings, and for disobedience in such cases, it has the power to

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convict for contempt; and in all matters submitted to their cognizance, to proceed according to the course of courts having by the common law jurisdiction of such matters, except so far as restricted by statute, with such incidental powers as are necessary to carry those granted into effect.

The jurisdiction of said court was considerably enlarged by the Revised Statutes, while nothing was taken away except by the section repealed in 1837. The incidental powers of the surrogate's court, before the Revised Statutes, being restored by such repeal, the question presented is, were they such as authorized said court, under any circumstances, to revoke, modify or change its final acts or decrees, duly entered. The order appealed from can only be sustained, if sustained at all, on the ground that the power was incident to the general powers possessed by the court in order to enable it to carry them into full and complete effect.

As indispensable to the administration of justice, surrogates' courts have, to a limited extent, exercised the right of revoking acts done by them; as where a decree was obtained by collusion or fraud, (*Toller on Ex'rs*, 73;) where a later will has been produced, (*Will. on Ex'rs*, 478;) where, after a will has been admitted to probate, the party supposed to be dead appears; when through accident or mistake a decree was taken by default, (*Pew v. Hastings*, 1 Barb. Ch. Rep. 452;) where a decree for distribution had been made, but before distribution a legatee, not known to be in existence, appeared; where the court had acted without acquiring jurisdiction of the person; or where a party in interest had not been cited; or where no guardian had been appointed for an infant; where an order was actually made but not entered, it might by order entered *nunc pro tunc*, vacate any act or proceeding which was irregular and void, (8 Paige, 12, 127; 10 *id.* 318; 3 Barb. Rep. 341; 1 Barb. Ch. Rep. 302; 1 Hill, 139;) and

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in *Sipperly v. Baucus*, (*supra*), it was held the court might correct any mistake, the result of accident; but such court can go no farther. Where parties in interest have been represented at a hearing, and final sentence or decree has been given, such court has no general power of opening or reversing its decree, on the ground that it erred as to the law, or decided erroneously upon the facts.

Can the correction sought in this case be said to come under the head of "mistake, oversight or accident." If not, the order of the surrogate was erroneous; otherwise it can be sustained.

The application shows that the petitioners employed counsel to make out their account for settlement, and left with him their vouchers for that purpose; that he made up the account; that the \$500 was omitted; that the error was not discovered until the account was presented, and then believing, and relying upon that belief, that the amount would be allowed to them on the balance known to be in their hands going to the person who had received such money, they did not ask to have the account corrected, but allowed the error to pass. The residuary legatee now refuses to allow said sum to be deducted from the amount in their hands; and as the decree is conclusive against them, they are without relief unless it can be opened and the amount allowed.

I think the transaction may be treated as a mistake or oversight. It comes clearly within the principle laid down in *Sipperly v. Baucus*, and within the incidental powers possessed by surrogates' courts; and therefore the surrogate did right in opening the decree, and correcting the error complained of.

The fact that the claim was disputed should make no difference; if it did, it would be disputed in every instance.

The error complained of was not in the amount settled, and hence did not come within 2 Revised Statutes, 5th ed. 181, section 7, subdivision 1.

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Upon the question of fact, whether the \$500 was included in a subsequent receipt for \$900, which had been presented and allowed on the settlement, the evidence was slightly conflicting. Although the finding of a surrogate upon conflicting evidence is not in all cases conclusive, it should be when the transaction was between living parties, where their conduct on the stand, and manner of testifying as witnesses, would influence in determining their credibility. But aside from this, the burden of proof was on the appellant; the executors produced his receipt for the sum claimed; its execution was not denied; it was for him to overcome that fact, to show that it had been included in another receipt; and in this he failed.

The order of the surrogate, and his final decree therein, affirmed, with costs.

[CLINTON GENERAL TERM, May 8, 1866. *Becker, James, Rosekrans and Potter, Justices.*]

JAMES M. WATERBURY and THE EAST RIVER FERRY COMPANY vs. THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, and THE NEW YORK AND HARLEM RAILROAD COMPANY.

THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY vs. THE NEW YORK AND HARLEM RAILROAD COMPANY, THE EAST RIVER FERRY COMPANY and OLIVER CHARLICK.

W. and the East River Ferry Company claimed title to a certain strip of land lying between First avenue and the East river ferry, in the city of New York, as assignees of a grant from the corporation of the city to the Farmers' Loan and Trust Company. By that grant certain lands under water, east of First avenue, except a space of 100 feet in width eastward from First avenue, in continuation of 84th street, were conveyed to the grantees, and the latter covenanted that they would, within three months after being

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required to do so, by the grantors, at their own expense, build and erect a wharf, avenue or street, 100 feet in width, from First avenue to Avenue A, and that they would keep in good order said street, wharf and avenue embraced in said 100 feet, and that it should thereafter continue to be a public street of the city. Under this conveyance W. and the ferry company had been for several months, and at the commencement of this action still were, engaged in filling in the land owned by them, adjacent to the said 100 feet, as well as said space of 100 feet, and in constructing a sewer across the same, and were preparing to grade and pave said space. Although no proceedings had ever been taken by the city corporation to lay out 84th street as a public street, from First avenue to the ferry-house, the strip of land between those points had been so far filled out and graded as to be constantly used by the public, in going to and from the ferry, and for common highway purposes, generally.

Two railroad companies having the right, under their respective charters and the permission of the corporation of the city, to extend their tracks across the strip of land in question, commenced, on different days, laying, constructing and extending their respective tracks in and through 84th street, and in continuation thereof, across the said strip, between First avenue and the East river ferry.

Held, 1. That 84th street, or the strip of land in question, having been, at the time when the railroad companies commenced constructing and extending their tracks in and through it, so far filled out and graded as to be constantly used by the public as a street, those companies had a right, so far as the plaintiffs were concerned, to construct and extend their several tracks through and over 84th street, or the strip of land in question, as far easterly as the grading or the condition of the street or strip of land would permit.

2. That the legal title to the strip of land in question was not in the plaintiffs, or in either, and neither had any beneficial interest in the soil thereof.
3. That considering that such strip of land was already devoted to the public use, it did not sufficiently appear that the devotion of it to an additional public use by the construction and operation of a railroad, or railroads, upon or through it, would appreciably injure either of the plaintiffs, by interfering with the filling up, or the grading, or the construction of the sewer, so as to authorize an injunction at their suit, on the ground of such interference.
4. That even though the plaintiffs might suffer some slight damage or inconvenience, from such interference, still, considering that all railroads must be deemed to be constructed and operated for public use, an injunction ought not to be sustained, where the ability of either railroad company to pay any damages that might be recovered in an action at law was not questioned.
5. That as between the two railroad companies, both having the right to extend their tracks in and through 84th street to the ferry, until one of them had actually commenced taking a qualified possession of the center or

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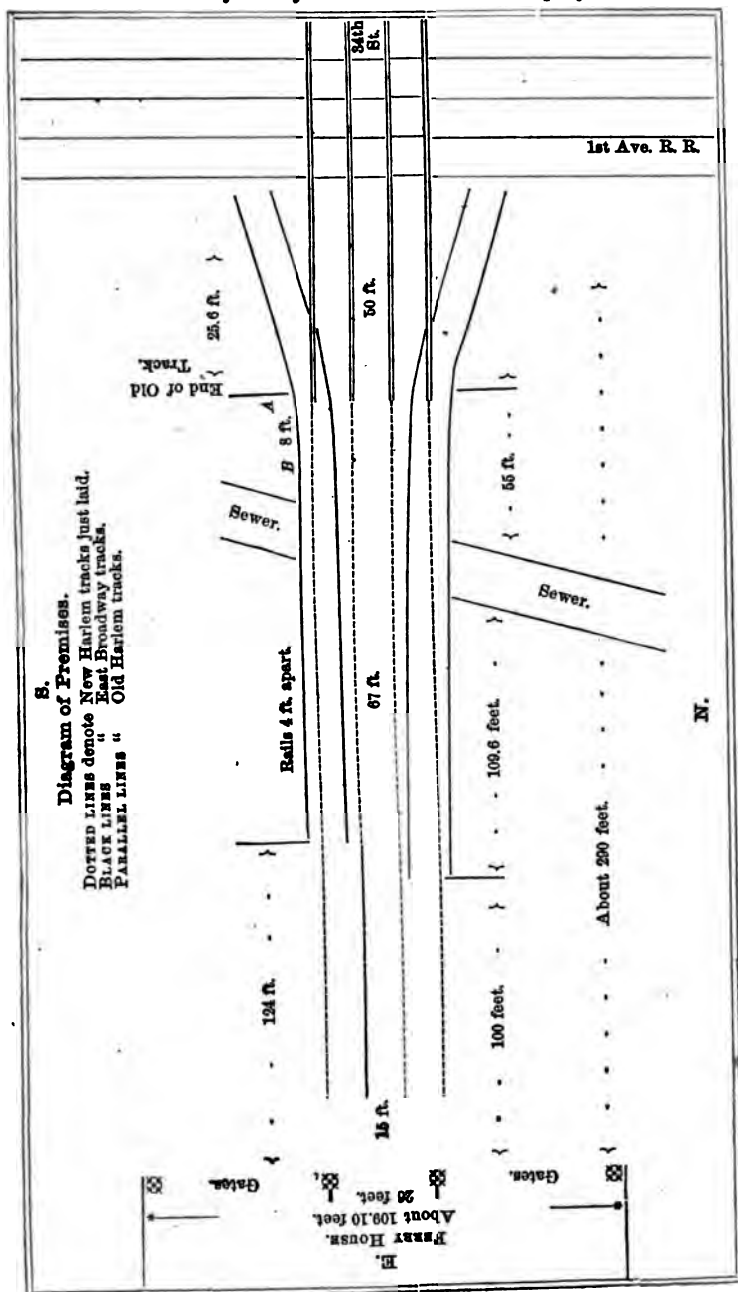
middle of 84th street, by locating and constructing their extension thereon, either had the right to make its extension there, to the exclusion of the other from that particular location.

6. That the company which first actually took a qualified possession of the center or middle of the street, or strip of land, by locating and constructing their extension for a part of the distance, until interfered with by the agents or servants of the other company, acquired the right to complete the construction of, and to operate, their extension, to the ferry, or as near to it as the condition of the street or strip, and the convenient operation of the ferry, would permit, to the exclusion of the right of the other company to interfere, in any way, with the construction and operation of the first mentioned company's extension as *thus located*.

THESE actions involved the right of the several parties to the use of a strip of land one hundred feet wide, east of First avenue, in continuation of 34th street, in the city of New York, extending to the East river ferry. (a) Waterbury and the East River Ferry Company, the plaintiffs in the first suit, claimed a right in the premises in question superior and paramount to either of the other parties, and insisted that neither of the railroad companies had any authority to enter upon the said premises, or to lay down rails and run their cars thereon. The title of those plaintiffs was founded upon a grant from the mayor, aldermen and commonalty of the city of New York, made on the 29th of January, 1847, to the Farmers' Loan and Trust Company, and a subsequent transfer of that title, from the trust company to them. The East River Ferry Company also insisted that the use of the premises by the defendants, the railroad companies, was an interference with the rights incident to the franchise which had been conferred upon them. By virtue of the above mentioned grant, certain lands under water, east of First avenue, except a space of one hundred feet in width, eastward from First avenue and in continuation of 34th street, were conveyed to the Farmers' Loan and Trust Company; and by that conveyance the grantees covenanted and agreed with the grantors, and their suc-

(a) See diagram on opposite page.

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cessors and assigns, that they would, within three months after they should be thereunto required by the grantors, &c., at their own proper costs and charges, build, erect, make and finish, or cause to be built, erected, made and finished, according to any resolution or ordinance of the corporation, a good and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, being the space in controversy in these actions. The grant also provided that the grantees, &c., should keep in good order said street, wharf and avenue embraced in said one hundred feet, and that it should thereafter continue to be a public street of the city of New York; and in case of a failure to comply with any of the said covenants, a right of entry was reserved to the grantors. Under this conveyance Waterbury and the East River Ferry Company had been for several months, and at the time of commencing this action still were, engaged in filling in the land owned by them adjacent to the said one hundred feet, as well as said space of one hundred feet, and in constructing a sewer by and under the direction of the Croton aqueduct department; and were preparing to grade and pave said space as soon as the city authorities should fix and determine the grade lines to which they must conform, as required by the covenant in the deed. No proceedings have ever been taken by the corporation of New York to lay out 34th street as a public street, from First avenue to the ferry-house, and there has been no interference with the ferry company and Waterbury, in performing the work, until the railroad companies attempted to take possession of, and occupy the land, by laying down their tracks.

The land in respect to which this controversy arose was originally a part of the East river, and entirely under water. In 1807 an act of the legislature was passed, by which commissioners were appointed to lay out the city of New York north of a certain line, and to prepare and

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file a map of the streets, &c. Section 8 of that act declared that said plan should be final and conclusive. A map was accordingly made, in pursuance of the provisions of that act, and the space of one hundred feet beyond First avenue, in continuation of 34th street, is not there laid down as a street.

The Dry Dock, East Broadway and Battery Railroad Company was organized under the general railroad act, and is in the enjoyment of franchises conferred by an act of the legislature, passed April 17, 1860, (*Laws of 1860, ch. 512,*) which authorized certain individuals therein named, and their assigns, to construct a railroad through certain streets in the city of New York to 34th street, and thence through and along 34th street, with a double track, to Avenue A; and thence through and along Avenue A, with a double track to, and to connect with, the double track in 14th street. Avenue A, referred to in the act, is on the East river, beyond the ferry-house of the East River Ferry Company, and was and is entirely under the water.

The New York and Harlem Railroad Company was chartered in 1831, to build a railroad from the city of New York to the Harlem river. (*Laws of 1831, ch. 265.*) In 1832 they were authorized by the legislature to extend their railroad through certain other streets in the city of New York, as the mayor, aldermen and commonalty of said city would, from time to time, permit. (*Laws of 1832, ch. 93, § 1.*) In 1849 they were authorized to construct a branch from their railroad to the East river, to such point as might be designated and permitted by the corporation of the city of New York. (*Laws of 1849, ch. 75, § 3.*) In March, 1864, the city corporation selected a point on the East river, to which such branch might be constructed, and gave the requisite permission to the company to extend the same, through 34th street, to the East river.

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The complaint in the first action alleges that the plaintiff, the East River Ferry Company, is a body corporate and politic, formed and organized under and pursuant to the act of the legislature of the State of New York, entitled "An act authorizing the formation of companies for ferry purposes," passed April 9th, 1853, and are the assignees and owners of a grant or lease executed by the mayor, aldermen and commonalty of the city of New York, of the right and privilege of running a ferry from the foot of 34th street, across the East river to Hunter's Point, Long Island. That the plaintiff James M. Waterbury is the owner, in fee, of a block of ground east of First avenue, between a line in continuation of the northerly line of 33d street, and a line in continuation of the southerly line of 34th street, and the exterior bulkhead line of the city, as established by law, except of that part thereof which is owned by the plaintiff, the East River Ferry Company. That the plaintiff, the East River Ferry Company, is the owner in fee of that portion of said block which is at the northeast corner thereof, and is about one hundred feet square, and of the southeast corner, being about one hundred feet square of the block north of the line, in continuation of the northerly line of 34th street and southerly line of 35th street, and east of First avenue. That on the 29th day of January, 1847, the land east of the First avenue, from the line in continuation of the northerly line of 33d street, and from the line in continuation of the northerly line of 35th street, to the exterior pier line, as established by law, was covered by the waters of the East river, and was the property of the mayor, aldermen and commonalty of the city of New York. The complaint then sets forth the above mentioned grant from the city corporation to the Farmers' Loan and Trust Company, and alleges that the plaintiffs, claiming and holding under the title of the Farmers' Loan and Trust Company the premises in question, have, for several months past been

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and now are engaged in filling in said land so as aforesaid belonging to them, and also said space of one hundred feet wide as aforesaid, but have not completed the filling in of their own land, nor of said space of one hundred feet, nor have they as yet regulated or paved said space of one hundred feet wide, nor any part thereof, as required by the covenant in the corporation deed. That no part of the same has been regulated or paved, nor has any part of said work been accepted by said the mayor, aldermen and commonalty as a complete compliance with or performance of said covenant to fill in, regulate and pave as aforesaid. That neither the plaintiffs, nor the parties through whom they derive their title, have been guilty of any breach of said covenant to fill in, regulate and pave said space of one hundred feet wide as aforesaid. That it is necessary to the plaintiffs in prosecuting the work of filling in, regulating and paving said space of one hundred feet wide, that they should have the possession and control of said space. That the defendants, the Dry Dock, East Broadway and Battery Railroad Company, claim and insist that they are a corporation incorporated under the act to authorize the formation of railroad companies and to regulate the same, passed April 2d, 1850, and of the acts amendatory thereof, and are the assignees of the franchise and rights granted by the act of the legislature to certain persons therein named, which act is entitled "An act to authorize the construction of a railroad in Avenue D, East Broadway, and other streets and avenues of the city of New York," passed April 17th, 1860. That part of the route designated in the said grant or franchise is described in the said act as being "through and along First avenue, with a double track, to 34th street; thence through and along 34th street, with a double track, to Avenue A; thence through and along Avenue A, with a double track, to and to connect with the double track in 14th street." The plaintiffs further allege that it is physio-

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ally impossible to build or extend the said railroad through or along the track thus designated. That much of the space thus designated is covered by the waters of the East river, and is beyond the exterior line defined and prescribed as the bulkhead line and the pier line in the act to establish bulkhead and pier lines for the port of New York, passed April 17th, 1857. That the said bulkhead line crosses Avenue A at a point near 25th street, and said line is distant from the intersection of First avenue and 34th street about three hundred feet. That the defendants, the New York and Harlem Railroad Company, were incorporated by the act entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831; and by an amendment thereto, and of other acts amending the same, passed March 6th, 1849, said company were authorized to construct a branch from their railroad (which was located on the Fourth avenue, in the city of New York,) to the East river, at such point as might be designated and permitted by the corporation of the city of New York. That at the time of the passage of said amendment, the line of high water mark of the East river, across 34th street, was between 167 and 246 feet west of the First avenue; but the land east of First avenue was under the waters of the East river. That no such permission as was above authorized was given, or pretended to be given, by the corporation of the city of New York until the 8th day of March, 1864, when by a resolution of that date the same was attempted or assumed to be given, as follows: "And they, the said the New York and Harlem Railroad Company, are also permitted to extend their road from the Fourth avenue, with double track, through 34th street to the East river, with the necessary switches and turnouts; with the privilege, in case they should deem the grade of 34th street impracticable, to connect their Fourth avenue track with 34th street through 32d street and Lexington avenue; provided,

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however, that said tracks be laid under the direction of the street commissioner; and that said company shall, within ten days from the passage of this resolution, notify the mayor in writing of their acceptance thereof. That while the plaintiffs were engaged in the performance of the work of filling in, and regulating and paving said space of one hundred feet wide in continuation of 34th street, east of First avenue, and on or about the night of the 17th day of June, 1865, the defendants, the Dry Dock, East Broadway and Battery Railroad Company, claiming to act under the alleged assignment of the grant or franchise contained in the act of the legislature, passed April 17, 1860, as aforesaid, without obtaining the consent or permission of the plaintiffs, or, as the plaintiffs are informed and believe, of the mayor, aldermen and commonalty of the city of New York, and against the will and consent of the plaintiffs, entered upon the said space of one hundred feet wide, which is in continuation of the line of 34th street, and dug up the surface thereof, and made great excavations in parts thereof, and piled up large quantities of timber, ties and sleepers on the ground, and attempted to lay heavy iron rails over a portion of the distance between First avenue and the exterior bulkhead line, so as to construct a railroad with a double track, and now give out and insist that they intend forthwith again to enter upon the said premises, and place thereon other ties, timbers, sleepers and iron rails, so as to form a railroad with a double track from a point near the First avenue to a point as near the exterior bulkhead line as they may be able to approach. That on or about the 19th of June, 1865, the defendants, the New York and Harlem Railroad Company, claiming to act under the authority of the permission granted by the common council as aforesaid, but not acting under the direction or supervision of the street commissioner, also entered upon the said space east of First avenue, on the line in continuation of 34th street, and placed thereon large

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quantity of ties, timbers and iron rails, and have constructed a railroad with double tracks in continuation of their 34th street branch aforesaid, and are now running cars thereon. That the tracks so attempted to be constructed by the defendants, the Dry Dock, East Broadway and Battery Railroad Company, were intended to be, and the tracks so constructed by the defendants, the New York and Harlem Railroad Company, are so laid as to interfere with the construction of a sewer being built by the plaintiffs, and greatly hinders and impedes the plaintiffs in the prosecution of the work of filling, regulating and paving the said space, and imposes upon them large extra delay, cost and expense, and greatly hinders and embarrasses and prejudices the plaintiffs in complying with the terms of the covenant as to filling in, regulating and paving said space of one hundred feet wide. That the plaintiffs are advised and believe that such entry upon the said premises and interference with the plaintiffs while engaged in their work of filling in, regulating, and paving the same, is wholly unauthorized by law, and of great damage and injury to the plaintiffs. That the said space of one hundred feet wide in continuation of the line of 34th street, east of First avenue, has not been opened as, nor has the same been declared by law to be or to constitute, one of the public streets or avenues of the city of New York; and that neither of the said defendants have agreed with the said mayor, aldermen and commonalty of the city of New York for the use or purchase of any part of said space of one hundred feet in width, which the plaintiffs have been engaged in filling in east of the First avenue as aforesaid, or of any right to construct railroad tracks thereon; nor have the said defendants, or either of them, instituted any proceeding to acquire the right so to use the said premises, or any part thereof, in the manner specified in, sections 14 to 21 inclusive, of an act entitled "An act to authorize the formation of railroad corpora-

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tions, and to regulate the same," passed April 2, 1850, or otherwise.

The plaintiffs ask and demand the interposition of the court, that the defendants and each of them, and the agents and servants and employees of each of them, and all persons acting and claiming to act by or under color or authority from either of them, may be enjoined and restrained by the order of this court from interfering with the plaintiffs in the possession of said space in continuation of 34th street, east of the First avenue, and from digging up the surface thereof, and from laying down any ties, timbers or iron rails or railroad tracks thereon, or from running cars thereon, until the plaintiffs have completed the filling in, regulating and paving of said space or street, and until possession of the same is accepted by the said mayor, aldermen and commonalty of the city of New York, and that the defendants, and each of them, be required and adjudged by the order and judgment of this court to abate and remove from the said space east of the First avenue, the ties, timbers and rails, and all other materials placed by them respectively on said space, and restore the surface of the ground as filled in, to the condition it was in before they entered upon the said premises and commenced to lay down said railroad tracks, and that meanwhile, and during the continuance of this action, the defendants be likewise restrained, and that the defendants pay the costs of this action, and for general relief.

The complaint in the second action alleges that the plaintiffs are a corporation, incorporated under the "act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, and the acts amendatory thereof, to construct, maintain and operate a railroad to and from the places, and upon the several routes of the railroad authorized by the act entitled "An act to authorize the construction of a railroad in Avenue D, East Broadway, and other streets and avenues of the

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city of New York," passed April 17th, 1860, and are the assignees and owners of all the rights and privileges conferred by said act upon the grantees therein named. That by virtue of the powers and authority conferred in and by said acts, these plaintiffs have laid their railroad tracks over the greater portion of the several routes therein specified, and particularly their double track in Avenue A, from 14th street to 23d street, being as far (or nearly so) in said avenue as the same has been opened for a public thoroughfare, and also in and along First avenue, with a double track from 23d street to 34th street, and since August, 1864, have been constantly running their cars and carrying passengers upon their said road between 11th street, near Avenue D, and Park Row at Broadway, a distance of about two and a half miles, and since the first day of June, 1865, have extended their route northerly and been constantly running their cars and carrying passengers from 14th street, near Avenue A, to said Park Row at Broadway.

That 34th street, from the First avenue, east to Avenue A, for the distance of about four hundred feet, although one of the public streets of the city of New York, has not, until about one month before the commencement of this action, been filled in or graded, or fit for transit or travel thereon, being covered mainly by the waters of the East river. That previous to that time, the bulkhead along the margin of waters of the East river, at the foot of 34th street, was within about fifty feet of the east line of the First avenue, and was occupied by ferry houses, or structures for ferry purposes, in the possession and enjoyment of the defendants, the East River Ferry Company, under a lease from the mayor, aldermen and commonalty of the city of New York, dated August 1st, 1857, of a ferry from the foot of 34th street, across the East river to Hunter's Point, on Long Island. That within a month previous to the commencement of the suit, 34th street, from adjacent

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to the said easterly side of the First avenue, and for the distance of about two hundred and eighty-seven feet easterly therefrom, had been filled in, graded and prepared for public travel thereon, as a public street or highway, and the said ferry landing, ferry houses, and structures of the East River Ferry Company have been removed to the new bulkhead on the East river, at the easterly end of said 34th street, and for the distance of about two hundred and eighty feet easterly from their former position; that the surface or bed of said street, for the distance of two hundred and seventy feet easterly from First avenue, being in a favorable condition for the laying and extending of the railroad of these plaintiffs thereon, from the First avenue, along 34th street, eastwardly towards Avenue A, so as to accommodate the passengers going to and from said ferry and ferry landing, the plaintiffs on the 17th day of June, 1865, commenced preparation for laying a double track thereon for their said railroad, and to connect the same by proper and necessary curves with their said double track on the First avenue, and proceeded to extend, lay and construct the same, and at the time of the commission of the acts and trespasses hereinafter mentioned, had located, laid, constructed and extended their railroad with a double track in and through 34th street, to a point two hundred and seventy-seven feet from the easterly side of the First avenue, and were proceeding to connect both the said tracks, by means of convenient and proper curves, with their said double track on First avenue, so that they would have been enabled, within five or six days, to commence running their railroad cars thereon for the conveyance of passengers to and from the easterly end of 34th street, so far as the same was graded and fit for travel, towards Avenue A, and could be conveniently built upon without interfering with said ferry landings. That the said tracks of the plaintiffs were each of the ordinary and usual gauge of railroads in the city of New York, to wit, of four feet

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eight and a half inches, and were located nearly in the center of 34th street, leaving a space between the inner lines of said tracks of five feet, and about forty-two feet six inches from the sides of said street. That the selection made by the plaintiffs for the site or location of their said railroad tracks was the most advantageous for railroad business, but that ample space was left in said street, at the sides of the tracks of the plaintiffs, for the location of the tracks of another railroad, without material interference with the rights or conveniences of each, other, and that such location was made prior to any location of the track of any other railroad company thereon. The complaint then sets forth the above mentioned grant from the corporation of New York to the Farmers' Loan and Trust Company, and alleges that in and by said deed it is covenanted on the part of the grantees and their assigns, that the said streets and avenues therein mentioned, among which was 34th street, described as a street of one hundred feet in width, should be and remain public streets, avenues and highways for free and common use and passage of the public. That the said defendant Oliver Charlick owns or claims some right or interest in the said premises, fronting on the northerly and southerly sides of that portion of 34th street, east of First avenue, which has been so as aforesaid filled in, graded and prepared for public travel as aforesaid. That said Charlick holds under said title of the Farmers' Loan and Trust Company, and the said East River Ferry Company, of which he is a stockholder or officer, claims to exercise some right or authority over the said portion of 34th street, over and upon which the plaintiffs laid and extended their railroad as aforesaid; but the plaintiffs allege that such claim is without any just pretense or reasonable excuse, and is unjustly advanced in order to aid and give countenance to the New York and Harlem Railroad Company in their usurpations and trespasses upon the property and rights

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of the plaintiffs, as hereinafter mentioned. The complaint then alleges the incorporation of the New York and Harlem Railroad Company, April 25th, 1831, and the amendment of the charter, by which the said company were authorized to construct a branch from their railroad to the East river, at such point as might be designated and permitted by the corporation of the city of New York, and the permission given for that purpose, as set forth in the complaint in the first action; and alleges that, acting under the resolution of the common council, and without other authority than is before stated, the New York and Harlem Railroad Company, in or about March or April, 1864, extended a double track from their railroad in the Fourth avenue easterly through 32d street, Lexington avenue and 34th street to the easterly side of the First avenue, and had for a year past been running cars thereon. That the plaintiffs, in extending their said railroad tracks as before mentioned into 34th street, were proceeding to run and construct the southerly track so as to avoid any contact or interference with the tracks already laid by the New York and Harlem Railroad Company, and to run and construct their most northerly track with a wide curve, so as to cross the tracks of that company at the intersection of 34th street and First avenue, and connect with the westerly track of these plaintiffs in First avenue, with the least inconvenience or interference with the operation of the said the New York and Harlem Railroad Company. That during the night of the 18th day of June, 1865, and between the hours of ten P. M. of that day, and six o'clock A. M. of the 19th day of that month, a large number of men, employed by or under the direction of the said Oliver Charlick and the New York and Harlem Railroad Company, but with the connivance and concurrence of the defendants, the East River Ferry Company, with force, violence, and against the wishes of the plaintiffs, entered upon, broke up and destroyed a large portion of said rail-

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road tracks, so laid by the plaintiffs in 34th street, and destroyed the connection thereof with the said curves, and laid in their place and stead iron rails and other materials belonging to them, across and upon the railroad ties of the plaintiffs, so as to form railroad tracks in continuation of the said branch of the New York and Harlem Railroad Company, a portion thereof on the same locations and lines as those previously occupied by the track of the plaintiffs, and the rest thereof substantially on the same lines and location, and have rendered the said tracks of these plaintiffs entirely useless for the purposes for which they were designed. And that the said the New York and Harlem Railroad Company, on the morning of the 19th day of June, at about six o'clock, began and have ever since continued against the wishes of the plaintiffs to run their cars thereon, and to exclude the plaintiffs from the possession or use of the location for the rails and railroad tracks so laid and constructed by them. That such acts were done without any direction or supervision of the street commissioner. That the inconvenience, loss and damage which will necessarily ensue and be sustained by the plaintiffs by means of such exclusion from the possession and use of the particular location for their rails, and the possession and use of their railroad track in manner aforesaid, could not be adequately assessed or measured in damages, and the acts of the defendants in so destroying the railroad tracks of the plaintiffs, and continuing to use and enjoy the benefits and advantages thereof, and excluding the plaintiffs therefrom, are contrary to equity and good conscience.

Wherefore these plaintiffs pray the interposition of this court, and that the defendants, and each and every of them, and the servants and agents of them, and each and every of them, be perpetually enjoined and restrained by the order of this court from interfering with the plaintiffs in the constructing, maintaining and using their railroad

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and railroad tracks upon the location in and upon which the said railroad structures and tracks of the plaintiffs were laid and placed in 34th street and First avenue, previous to and on the evening of the said 18th day of June, 1865, and that the New York and Harlem Railroad Company, their servants and agents, may be perpetually enjoined and restrained from using or interfering with the railroad tracks so adopted and selected by the plaintiffs, and from maintaining or using any railroad tracks or structures on the location so selected and occupied by the plaintiffs in the First avenue and in 34th street, east of the First avenue; and for general relief.

Upon the complaint in the first of the above-entitled actions, and affidavits thereto annexed, an order was made by Justice MILLER, on the 26th of June, 1865, enjoining and restraining the defendants in that action, and each of them, their agents and servants, and every and all persons acting or claiming to act by or under color of authority from them, or either of them, from interfering with the plaintiffs in the possession of the space one hundred feet wide in continuation of 34th street, east of the First avenue in said city, and from digging up the surface thereof, and laying down any ties, timbers, or iron rails or railroad tracks thereon, or from running cars thereon, until the plaintiffs in this action should have completed the filling in, regulating and paving of said space or street, and until possession of the same should be accepted by the mayor, aldermen and commonalty of the city of New York, or until the further order of the court.

An order was subsequently granted, requiring the plaintiffs to show cause, on the 30th day of June, 1865, why such injunction should not be dissolved. The hearing upon said order to show cause was adjourned, by consent of parties, until the 7th day of July, 1865, before Justice MILLER; when the motion to dissolve the injunction was denied, with ten dollars costs to be paid by the defend-

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ants, the Dry Dock, East Broadway and Battery Railroad Company. From this order the latter company appealed to the general term.

Upon the summons and complaint in the second of the above-entitled actions, an order was made by Justice INGRAHAM, on the 22d of June, 1865, whereby the defendants were required to show cause at a special term, at chambers, on the 28th day of June, 1865, why the defendants, and each and every of them, and the servants and agents of them, and each and every of them, should not be perpetually enjoined and restrained from interfering with the plaintiffs in the constructing, maintaining and using their railroad and railroad tracks upon the location in and upon which the railroad structures and tracks of the plaintiffs were laid and placed on 34th street and First avenue, previous to and on the evening of the 18th day of June, 1865, and as in said complaint particularly described; and why the New York and Harlem Railroad Company, their servants and agents, should not be perpetually enjoined and restrained from using or interfering with the railroad tracks adopted and selected by the plaintiffs, and from maintaining or using any railroad tracks or structures on the location selected by and occupied by the plaintiffs in First avenue and in 34th street, east of the First avenue; and why the plaintiffs should not have such other and further relief as might be agreeable to equity; and by which order the said justice meantime, and until the further order of the court in the premises, enjoined and restrained the defendants, and each and every of them, from interfering with the plaintiffs in the constructing and maintaining and using the railroad and railroad tracks upon the location in and upon which the railroad structures and tracks of the plaintiffs were laid and placed in 34th street and First avenue, previous to and on the evening of the 18th day of June, 1865. And by such order the said justice enjoined and restrained the defendants, the New

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York and Harlem Railroad Company, their workmen, servants and agents, until the further order of this court, from using or interfering with the railroad tracks or structures upon the location adopted and selected by the plaintiffs in 34th street, east of First avenue.

The hearing upon said order to show cause was adjourned, by consent of all the parties to this action, to the 7th day of July, 1866, before Justice MILLER, at special term, when sundry affidavits were presented on the part of the defendants, also the deed from the corporation of New York to the Farmers' Loan and Trust Company. After hearing counsel in support of, and in opposition to said motion, an order was made denying the motion for a perpetual injunction, and discharging the order to show cause; and the temporary injunction and restraint therein contained was in all things vacated and set aside, and the parties, plaintiffs and defendants, declared henceforth to be in the same plight and condition as if said order and temporary injunction had not been made; with ten dollars, costs of the motion, to be paid by the plaintiffs to the defendants.

From this order the plaintiffs, the Dry Dock and Railroad Company, appealed to the general term.

A. J. Vanderpoel, for the East River Ferry Company and James M. Waterbury.

Horace F. Clark, *A. Schell* and *C. A. Rapallo*, for the Harlem Railroad Company and Oliver Charlick.

H. W. Robinson, for the Dry Dock, East Broadway and Battery Railroad Company.

SUTHERLAND, J. When the Dry Dock, East Broadway and Battery Railroad Company commenced constructing and extending their tracks, in and through 34th street, or

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the strip of land one hundred feet wide, to a point about two hundred and seventy-seven feet easterly from the easterly side of First avenue, I understand from the papers in this case that 34th street, or the strip of land between the then easterly terminus of the New York and Harlem Railroad tracks in 34th street, and the place to which the ferry-house had been removed, and where it then was, had been so far filled out and graded as to be constantly used by the public in going to and from the ferry, and for common highway purposes, generally. This being so, and considering other undisputed facts and circumstances of the case, I cannot see why either of the railroad companies had not then a right, as to Waterbury and the ferry company, to construct and extend their tracks through and over 34th street, or the strip of land between the points last mentioned, as far easterly as the grading or the condition of the street or strip of land would permit.

The legal title to the strip of land was not in Waterbury and the ferry company, or in either, and neither had any beneficial interest in the soil thereof.

Considering the then devotion of it to public use, I do not think it sufficiently appeared that the devotion of it to an additional public use, by the construction and operation of a railroad or railroads upon or through it would appreciably injure either Waterbury or the ferry company, by interfering with the filling up or the grading, or the construction of the sewer, to authorize the injunction at their suit, on the ground of such interference. It appears to me that the ferry company must be actually benefited by the extension of either railroad, or both.

Moreover, as the ability of either railroad company to pay any damages that might be recovered in an action at law, for any possible injury to Waterbury and the ferry company, or either, by, or from, such claimed or supposed interference, is not questioned; considering that all rail-

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roads must be deemed to be constructed and operated for public use, I do not think the injunction at their suit ought to be sustained, even if we could see that by or from such interference they might suffer some slight damage or inconvenience.

I think the injunction at the suit of Waterbury and the ferry company, restraining the railroad companies, should be vacated, with costs.

As to the question between the two railroad companies, I assume and think that before the Dry Dock, East Broadway and Battery Railroad Company actually commenced locating, constructing and extending their tracks, in and through 34th street, or the strip of land 100 feet wide, both or either of the railroad companies had the right, as between each other, to extend their tracks easterly in or through 34th street or the strip of land, to the ferry, or as far as the grading and condition of the street, or strip of land, would permit.

Before the Dry Dock, East Broadway and Battery company actually commenced taking a qualified possession of the center or middle of that part of 34th street, or the strip of land, by locating and constructing their extension, I do not see why either railroad company had not a right to make their extension through or along the center or middle of the street or strip, to the exclusion of the other from that particular location. I do not see upon what principle the court could have favored the right of either company thus to *locate* their extension, to the exclusion of the other, before any actual attempt at such location. But I think that the Dry Dock, East Broadway and Battery Company, by first actually taking a qualified possession of the center or middle of the street, or strip of land, by locating and constructing their extension as far as they did, until interfered with by the agents or servants of the other railroad company, acquired the right to complete the

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construction of, and to operate, their extension, to the ferry, or as near to it as the condition of the street or strip, and the convenient operation of the ferry, would permit, to the exclusion of the right of the other company to interfere, in any way, with the construction or operation of the Dry Dock, East Broadway and Battery extension, *as thus located.*

I have carefully examined the question between the two railroad companies, and can see no other principle or ground upon which we can put our decision.

I do not think that the circumstance that the New York and Harlem Railroad Company, or its officers or agents, *intended* to further extend their tracks through the *center or middle* of the street, or strip of land, and had the ties and other materials for such extension, or the circumstance that such intended extension; through the center or middle, would be more convenient for them, in the construction or use, because their tracks east of First avenue, which had been constructed some time before the other railroad company commenced locating and constructing their extension in the center or middle of the street or strip, ran through and terminated in the center or middle of the street or strip, did or could affect or impair the right of the Dry Dock, East Broadway and Battery-Company first to actually locate and commence constructing their extension, as they did.

The order, in the action between the railroad companies and in which Oliver Charlick and the ferry company are parties defendants, should be reversed, and the injunction which was vacated by it restored and continued, with costs to the plaintiff to be paid by the New York and Harlem Railroad Company.

GEO. G. BARNARD, P. J., concurred.

CLERKE, J., dissented.

Dennis v. Snell.

Injunction in first action dissolved, with costs. The order appealed from in the second action reversed, and the injunction which was vacated by it restored and continued, with costs to the plaintiffs, to be paid by the New York and Harlem Railroad Company.

[NEW YORK GENERAL TERM, June 15, 1866. *Geo. G. Barnard, Clerks and Sutherland, Justices.*]

DENNIS vs. SNELL.

The defendant, being sued as sheriff, for taking and selling on execution property of the plaintiff claimed to be exempt, justified the taking by virtue of an execution issued to him as sheriff, out of the county clerk's office, "commanding him to collect of the goods and chattels of D. &c. \$60.84, which P. recovered against them, for damages and costs, on &c., before M., a justice of the peace, &c., a transcript of which was duly filed and judgment docketed in the clerk's office," &c.; not expressly setting up as a defense the judgment on which the execution was issued. The plaintiff having proved, on the trial, the levy upon and sale of his team of horses, wagon and harness, by the defendant; that he was a householder, having a family; that such team was used in their support, and that he had no other property, except some household furniture worth about \$50; and that he forbade the sale, claiming the property to be exempt; the defendant offered to prove that the execution "was issued upon a judgment rendered on a note which was given for another horse, which was the plaintiff's exempt team." *Held* that the judgment not having been set up in the answer as a defense, nor alleged to have been for the purchase price of exempt property, the judge was right in refusing to allow the defendant to show its consideration, as a defense to the plaintiff's claim of exemption from levy and sale, on execution, of the property in suit.

The existence of the judgment, in such a case, is new matter, and requires to be pleaded.

When an officer sees fit to go beyond the power of the process, or for any other reason, when sued, it becomes necessary for him to prove a judgment, he, no more than any other party, can do so, without having alleged its existence, in his answer.

An application for leave to amend a pleading, on the trial, is always addressed to the discretion of the court; and if denied, is not the subject of appeal or review.

54	411
82h	43h
54b	411
43ap	560

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Where the real defense is new matter, viz., a justification for taking property under a judgment and execution, if the defendant is an officer, and relies entirely upon the execution, as a defense, and nothing beyond it, it is sufficient for him merely to set forth the fact; but if he desires to go farther, or it becomes necessary to inquire into the consideration of the judgment, he must plead such judgment, and set it forth in his answer. And having averred the existence of a judgment, he will be at liberty to prove it, and then to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff.

THIS was an action against the defendant as sheriff, for taking and selling on execution property alleged to be exempt.

The complaint averred that the defendant was sheriff of Montgomery county; that in May, 1864, by his deputy, he took away and converted certain property of the plaintiff's, of the value of \$232; that the plaintiff was a householder, and had a family for which he provided, and that said property was his team used in their support.

The answer, after denying most of the allegations of the complaint, for further answer, justified the taking by virtue of an execution issued to the defendant as sheriff, out of the clerk's office of Montgomery county, "commanding him to collect of the goods and chattels of Alonzo F. Dennis and another, \$60.84, which Joseph Platner recovered against them for damages and costs, on the 2d day of May, 1863, before Charles McLean, a justice of the peace of the county of Otsego, a transcript of which was duly filed and judgment docketed in the clerk's office of Montgomery county, April 1st, 1863, (as it is stated in said execution,) and if sufficient goods," &c.; that said defendant was sheriff of said county of Montgomery; that said property was duly sold, &c.

On the trial, the plaintiff proved that the defendant was sheriff; that one La Rue was his deputy; that La Rue, by virtue of an execution, as set forth in the answer, levied upon one bay horse, one bay mare, one double harness and one double lumber wagon, the property of the plaintiff, and

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sold the same; that their value was \$225; that at the time the plaintiff was a householder and had a family for which he provided; that this was his team used in their support; that he had no other property, except some household furniture worth about \$50; and that the plaintiff forbade the sale and claimed the property as exempt.

The defendant thereupon offered to prove that the execution in question "was issued upon a judgment rendered upon a note which was given for another horse, which was the plaintiff's exempt team." The plaintiff objected to this proof, on the ground that it was inadmissible under the pleadings as evidence, and that the defendant had not set up any such matter as a defense in the answer. The court sustained the objection, and the defendant excepted.

The defendant then asked leave to amend his answer, to which the plaintiff's counsel objected, and the court declined to allow the amendment, and the defendant excepted.

When the plaintiff rested, the defendant moved for a nonsuit, on the following grounds: "1st. That the plaintiff has not shown by the proofs that the property taken and sold was exempt property; nor did it appear from the pleadings. 2d. If he has shown the property exempt, then the seizure thereof upon the execution was without the command of the process, and the defendant is not liable." The court denied the motion, and the defendant excepted.

The defendant then offered to prove the judgment upon which the execution in evidence was issued, and to show that it was rendered for another horse which was exempt. This was objected to on the ground that no judgment had been set up in the answer, and no allegation that it was for the purchase price of exempt property. The court sustained the objection, and the defendant excepted.

The court submitted the question of value to the jury,

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and, upon their finding, directed a verdict for the amount for the plaintiff.

Smith & Countryman, for the plaintiff.

A. H. Ayres, for the defendant.

By the Court, JAMES, J. The motion for a nonsuit was properly denied. It was made clearly to appear that the property which the defendant took and sold was exempt from levy and sale on execution. I cannot find any thing in the case on which to sustain the other ground for nonsuit. If it was based on the idea that the execution contained a direction excepting exempt property from its operation, that fact should have appeared in the case, either by statement, or a copy of the writ set forth, in order to raise the point on appeal. In the absence of all evidence of such exception, the court cannot assume that the writ contained such a direction, although that may be the usual form. Therefore the point cannot be considered.

An application for leave to amend a pleading on the trial is always addressed to the discretion of the court; and, if denied, is not the subject of appeal or review. (*Phinck v. Vaughan*, 12 Barb. 215. *New York Marbled Iron Works v. Smith*, 4 Duer, 362. *Hendricks v. Decker*, 35 Barb. 298.)

The complaint in this case set forth the whole grounds of the plaintiff's cause of action, viz., that the defendant was sheriff, La Rue his deputy, the taking and conversion of property under and by virtue of an execution against him, and that such property was exempt. It set forth more than was necessary. The cause of action was complete without any statement of the reason or authority for taking the property, and its exemption. (*Butler v. Mason*, 16 How. 546.) Such allegations were no part of the gist of the cause of action, and were not necessary to be proved

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in the first instance, to entitle the plaintiff to recover. (*Bedell v. Carl*, 33 *N. Y. Rep.* 581. *Esselstyn v. Weeks*, 2 *Kern.* 635. *Sands v. St. John*, 36 *Barb.* 628, 631.) The proof of such facts could only become necessary to meet a defense, and could then be given in evidence without having been pleaded. (*Esselstyn v. Weeks*, *supra*.) Therefore the averment of these facts in the complaint did not impose upon the defendant the necessity of averring in his answer any facts other than such as were necessary to answer the material allegations of the complaint. In other words, the defendant was not compelled to set up in his answer the non-exemption of the property sued for, or be excluded from proving it on the trial, merely because the plaintiff averred its exemption in the complaint. The Code only requires the complaint to contain a plain and concise statement of the facts constituting the cause of action; in this case, that the defendant by his deputy took and converted his property and its value. The answer only required a general or specific denial of each material allegation, or the statement of new matter constituting a defense or counter-claim. In this case the real defense was new matter—a justification under a judgment and execution. But as the defendant was an officer, if he relied entirely upon the execution, and nothing beyond it, it was sufficient for him, in such case, merely to set forth the fact; but if he desired to go farther, or it became necessary to inquire into the consideration of the judgment, it would be necessary to plead such judgment and set it forth in his answer; and having averred the existence of a judgment, he would be at liberty to prove it; and would then be at liberty to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff.

The theory of such a trial is this: The plaintiff having averred the tortious taking of his property by the defendant, proves the act and the damage, and rests. The

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defendant having set up that he took it as an officer, by virtue of an execution against the plaintiff's goods and chattels, proves such execution, and rests. The plaintiff then, as he may without argument, because the Code allows no reply to new matter constituting a defense in an answer, prove that he is a householder, with a family, and that the property taken was his team; that would take the property without the execution. Then before the defendant can be permitted to overcome this, by proof of the consideration of the judgment, he must first establish his judgment. The existence of the judgment was new matter, and required to be pleaded. If the property in controversy had not been exempt property, an execution fair on its face would protect the officer, even though there was no legal judgment to back it, and therefore the existence of a judgment for that purpose need not be averred. This is merely for the personal protection of the officer executing process; but when the officer sees fit to go beyond the power of the process, or for any other reason, when sued, it becomes necessary for him to prove a judgment, he, no more than any other party, can do so without having pleaded its existence, in the answer.

Therefore, for the reason that the judgment on which the execution was issued was not set up in the answer, the judge at circuit was right in refusing to allow the defendant to show its consideration as a defense to the plaintiff's claim of exemption from levy and sale, on execution, of the property in suit.

Judgment affirmed.

[SCHENECTADY GENERAL TERM, JANUARY 2, 1866. *Booke, James, Potter and Rosekrans*, Justices.]

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Although the forms of action were abolished by the Code, the principles by which the different forms of action were previously governed still remain, and now, as much as formerly, control in determining the rights of parties.

In pleading, a party is now to state the facts on which he relies to sustain a recovery; and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action.

By the rules of practice and pleading before the Code, an action of trover could not be sustained without proof of a detention or conversion of the property alleged to have been unlawfully taken; but as the forms of pleading do not now control, the court, in an action for wrongfully taking and carrying away and converting property, must examine the evidence, and if the proof, or facts found by the jury, entitle the plaintiff to a judgment, such judgment should be given, even though not asked for by the complaint.

The plaintiff having in his possession a buggy wagon which he had hired for a year, from J., let it to the defendant. It was used by H. and was brought back and received by the plaintiff. The wagon having been injured by H. during its use, the plaintiff sent it to a shop, for repair. H. afterwards told him to get the wagon fixed, and he would pay for it; the defendant becoming his surety for such repairs. Subsequently H. and the defendant took the wagon to another shop, had it repaired and returned it to the plaintiff, before suit brought, and it remained in his possession. *Held* that the bailment of the wagon continued until it was repaired and returned; and there being an implied license from the plaintiff to H., and the defendant acting under him, to have the wagon repaired, the removal of it from one shop to another, for that purpose, was not an unlawful *taking* of the property.

Held, also, that there was no *conversion*; that the defendant was guilty only of a mere asportation; he did not interfere with the plaintiff's dominion over the wagon; his title being recognized and acknowledged, throughout; it was not taken or detained with the intent to convert it to the defendant's use, or the use of any one else; he assumed no ownership over it; and it was not injured while in his possession.

Held, further, that even if it were conceded that the defendant was guilty of a technical trespass, the plaintiff was not entitled to recover the full value of the wagon. That he having but a special property in the wagon, under a bailment for a year, and it not having been converted, J., the general owner, could, at the expiration of the year, follow and take it, wherever found.

That there being not only no conversion, but a return of the property before suit brought, the plaintiff's refusal, then, to accept it, entitled him to recover only the value of his special property. And that, in the absence of any proof of the value of the plaintiff's special interest in the wagon, the court could not assume it to be over six cents.

Eldridge v. Adams.

THIS is an application for judgment upon a verdict subject to the opinion of the court at general term.

The action was for wrongfully taking and carrying away and converting a certain buggy wagon of the value of \$250, for which sum the complaint demanded judgment.

The answer, *first*, denied the complaint; *second*, averred that after the alleged taking, and before action, the defendant returned the buggy to the plaintiff's possession, in better condition than at the time of the alleged taking, and that the plaintiff has ever since retained it. *Third*, that in July, 1864, the plaintiff kept a livery stable; that on that day the defendant obtained of the plaintiff a horse and buggy for one Hall; that on Hall's return the buggy was broken; that the plaintiff claimed damages; that it was agreed between the plaintiff, defendant and Hall, that the plaintiff should send the buggy to be repaired at the expense of Hall, the defendant guaranteeing the payment of all expenses; that the plaintiff sent the buggy to the shop of one Francisco; that the next day the defendant and Hall went to said shop, and the buggy not being repaired or in process of repair, they, with said Francisco's assent, took the buggy to another shop, had it repaired the same day and returned to the plaintiff's premises, and the plaintiff was notified of the fact.

The testimony showed that in July, 1863, the plaintiff had in his possession a buggy wagon hired from one Jenkins until the next May; that the plaintiff let it to the defendant; that it was used by one Hall; that it was brought back the same day and received by the plaintiff; that it had been injured by said Hall during its use; that the plaintiff sent it to the shop of one Francisco for repair; that the plaintiff, after that, saw the defendant and Hall, and that Hall told him to get the buggy fixed and he would pay for it, and the defendant became Hall's surety for such repairs; that at this time some unpleasant words

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passed between the parties; that in the afternoon Hall and the defendant took the buggy from Francisco's shop, without any objection on his part, to another shop, had it repaired and returned to the plaintiff by four o'clock of the same day; that the plaintiff got out a summons in this action before he heard that the buggy had been returned; that the summons was not served until about eight o'clock; that the plaintiff examined the buggy the next morning, and notified the defendant that he should not receive it, and the buggy still remains in the plaintiff's possession.

At the close of the plaintiff's evidence the defendant moved for a nonsuit, which was denied, and the defendant excepted.

At the final close of the case the court submitted the following questions to the jury: 1st. When the wagon was repaired and returned by the defendant, was it accepted by the plaintiff? 2d. If you answer the first question in the negative, then, what was the value of the wagon at the time it was taken by the defendant?

The jury answered the first question in the negative, and found the value of the wagon to be \$200.

The court thereupon directed a verdict for the plaintiff, subject to the opinion of the court at general term,

Merrill & Cowen, for the plaintiff

J. A. Shoudy, for the defendant.

By the Court, JAMES, J. Upon the foregoing facts and verdict, the plaintiff moved at the last general term for judgment for \$200 damages. This motion was resisted by the defendant, who demands judgment in his favor, for costs.

Although all forms of action were abolished by the Code, the principles by which the different forms of action were previously governed still remain, and now, as much as

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formerly, control in determining the rights of parties. In pleading, a party is now to state the facts on which he relies to sustain a recovery, and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action.

In this case, the complaint charges an unlawful taking and conversion. For an unlawful taking the remedy would formerly have been trespass; but for an unlawful taking and conversion the action would have been trover. It has often been said that trover would lie wherever trespass could be maintained; that, however, was not quite correct, because trover could not be maintained unless there was some act amounting to a conversion; while trespass could be sustained for any unlawful touching, or taking. The present, judged by the rules of practice and pleading before the Code, would be an action of trover; and it could not be sustained without proof of a detention or conversion of the property alleged to have been unlawfully taken, (*Fouldes v. Willoughby*, 8 Mees. & W. 540;) but as the forms of pleading do not now control, we must examine the evidence, and if the proof or facts found by the jury entitle the plaintiff to a judgment, such judgment should be given him, even though not asked for by the complaint.

Upon the facts, two questions arise: Was there any unlawful taking of the property in dispute? Was there any conversion of such property?

In considering the first point, it is proper distinctly to understand the subject matter of the action, the acts complained of, and the relation of the parties to the subject matter, to each other and to the act. The subject matter was a buggy wagon, the act a temporary removal from one wagon shop to another for repair, and its immediate repair and return. The parties had been bailor and bailee of the subject matter; it had been injured during the

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bailment, by the bailee, and the bailor had called upon the bailee to repair and he had assented and agreed to pay for such repair. This being so, the bailment of the buggy continued, and Hall was liable for its use, until it was repaired and returned. The case shows an implied license from the plaintiff to Hall, and the defendant acted under him, to have the buggy repaired, and hence the removal proved was not an unlawful act. An implied license is one which, though not expressly given, may be presumed from the acts of the party having a right to give it, or from the character of the act.

In this case, the acts and the demand of the plaintiff warranted Hall in believing that he was to be held responsible for the use of the buggy during its repair, as well as for its repair; and there being no demand for specific damage, or place of repair specified, it was a fair inference from the facts that Hall had liberty to get it repaired where he pleased, and as soon as he could. His acts in removing the buggy with the defendant's aid, and returning it in a few hours repaired, is consistent with this view; it shows Hall so understood it, and acted upon such understanding.

In this view the plaintiff has established no cause of action, and judgment should be given for the defendant, notwithstanding the verdict.

But suppose the foregoing conclusion wrong, and that the removal of the buggy for repair was a wrongful act, then will arise the second question, "Was there a conversion of the property?"

It is certain there was no conversion, or intent to convert, *in fact*. The property was taken from one mechanic shop to another for repair, immediately repaired and returned to the plaintiff's premises; and although he refused to receive it, it remained, with him at last accounts.

But it is claimed the taking being unlawful, that of itself constituted a conversion. To sustain this position the

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court was cited to *Bristol v. Burt*, (7 John. 254;) *Murray v. Burling*, (10 id. 172;) *Reynolds v. Shuler*, (5 Cowen, 323;) and *Connah v. Hale*, (23 Wend. 462.) But neither of these cases sustains the plaintiff's position. In each case there was a conversion proved independent of the unlawful taking. In *Bristol v. Burt*, the defendant refused the plaintiff his property after demand. In *Murray v. Burling*, the defendant had disposed of the property. In *Reynolds v. Shuler*, the property was sold at auction. In *Connah v. Hale*, the defendant refused to deliver up the property on demand. The substance of these decisions, so far as they bear on this case, is that "if one undertake to exercise dominion over personal property, in exclusion, or in defiance of the owner's right, it is a conversion." That is the difference, and a very important difference it is, between those cases and the present. In this case the defendant did not "undertake to exercise any dominion over the buggy in exclusion or in defiance of the owner's rights." All he did was in subordination and acknowledgment of the plaintiff's rights.

This case is more like that of *Fouldes v. Willoughby*, (8 Mees. & Wels. 540,) where the defendant, having charge of a ferry boat, after the plaintiff had paid the fare for himself and two horses, the defendant, for some misconduct, told the plaintiff to remove his horses from the boat, as he would not carry them; the plaintiff refused, and the defendant took them from the plaintiff and put them on shore; the defendant remained on board and was carried over the river. On the trial, at *nisi prius*, the judge charged "that the defendant, by taking the horses from the plaintiff, and turning them out of the vessel, had been guilty of a conversion." The Court of Exchequer on a rule to show cause, held the charge wrong, "that the mere wrongful asportation of a chattel did not amount to conversion, unless the taking or detention of the chattel was with the intent to convert it to the taker's own use, or that of some

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third person, or unless the act had the effect either of destroying or changing the quality of the chattel." In the same case Lord Abinger said: "It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself, or by those for whom he acts, or that owing to his act the goods are destroyed or consumed, to the prejudice of the lawful owner." "That it had never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounted to a conversion of the chattel." Baron Alderson recognized as the true principle the statement of counsel in *Shipwick v. Blanchard*, (6 T. R. 299,) which was this: "to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or for the use of those for whom he is acting. But that when a man does an act, the effect of which is not for a moment to interfere with the dominion of the owner over the chattel, but, on the contrary, recognizing throughout the title of such owner, such an act cannot be said to be a conversion." It was held in *Heald v. Carey*, (9 L. and E. Rep., Eng. Com. Pleas, 429,) that there is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion over them inconsistent with that right.

. The defendant in this case was guilty only of a mere asportation of the buggy; he did not interfere with the plaintiff's dominion over the buggy; his title was recognized and acknowledged throughout; it was not taken or detained with the intent to convert it to the defendant's

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use, or the use of any one else; he assumed no ownership over it; it was not injured while in his possession. In fact there was no element in the proof on which a conversion could be predicated.

In this view, even the cause of action set forth in the complaint wholly fails, "as no damages are recoverable in the form of trover for the simple act of taking." (*Cooper v. Chitty*, 1 *W. Black.* 65. *Bushel v. Miller*, 1 *Strange*, 128.) But as all forms are abolished, the action must stand or fall upon the facts proved. If it were conceded that the defendant was guilty of technical trespass, the question would only be one of damages. Even in that view the plaintiff claims to recover the full value of the buggy, by the jury fixed at \$200. There are several reasons why he should not recover that amount. He had but a special property in the buggy, a bailment for a year; and it not having been converted, the general owner, at the expiration of the bailment, could follow and take it wherever found, as this action would be no bar to his rights. There was not only no conversion, but a return of the property was made before suit brought, and the plaintiff's refusal then to accept only entitled him to recover the value of his general property. In *Brierly v. Kendall*, (10 *L. and E. Rep.* 319,) goods had been left as security for a debt, to be void on payment of a specified sum by a certain day, the assignor to have possession until default; before default the goods were seized and sold. Held that bailor could maintain trespass, and that his measure of damages was not the value of the goods, but his limited interest therein. In this case there was no proof of the value of the special interest of the plaintiff in the buggy, and this court cannot assume it to be over six cents.

In my view of the case there was an implied license to Hall and the defendant to do precisely what they did do; and judgment should, therefore, be given for the defend-

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ant, with costs; but if my brethren do not concur in this view, then the plaintiff is entitled to judgment for six cents damages.

Judgment was directed for the defendant.

[ST. LAWRENCE GENERAL TERM, October 2, 1866. *Bookes, James, Rosekrans and Potter, Justices.*]

 DAVIS vs. PECK.

Where notes given by the defendant to the plaintiff as "receiver of the W. bank," for money lent by the latter upon checks signed by him as "receiver &c.," were indorsed by the plaintiff as "receiver &c.;" *Held* that by such indorsement the title to the notes was transferred to the plaintiff individually, and, *prima facie*, became vested in him; and that, in the absence of any proof to the contrary, the plaintiff was entitled to prosecute them in his individual character; he testifying, without contradiction, that these were individual transactions.

Held, also, that such notes having been received in evidence, with the indorsements, without any objection being made that the indorsements were not proved, or any point being taken on that account, the fact that the plaintiff had used money in his hands as receiver, in making some of the loans on the notes, was not sufficient to establish that they did not belong to him individually; especially where there was evidence to show that on a meeting between the parties in the presence of an accountant, for the purpose of having their accounts looked over &c., and a balance struck, the notes were presented by the plaintiff as an individual claim against the defendant, and were recognized by the latter, as such, without objection.

Held, further, that there was no error in allowing the plaintiff to be asked, when examined as a witness, whether one of the loans was an individual transaction; and whether he loaned the money as his own, or as receiver; those inquiries embodying a fact within the knowledge of the plaintiff, and not requiring the expression of an opinion upon the law of the case.

When an attorney is employed by a party, the law implies a contract between them; and before a new partner of the attorney can be made a party to such contract, there must be some agreement or understanding to place him in a position which will enable him to make a claim against the client, for services in the suit.

In the absence of any proof of such an agreement, or the substitution of the firm as the attorneys or counsel of the party, the relation of attorney and

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client does not exist between the firm and such party, with the assent of the latter; and consequently the attorney originally employed may recover for his services in the suit, in an action brought by him alone.

THIS action was tried before Wm. T. Odell, Esq., as sole referee. It was brought to recover the amount of certain promissory notes, executed by the defendant to the plaintiff, for money loaned by the plaintiff to the defendant upon his (the plaintiff's) checks, and for services rendered by the plaintiff for the defendant as attorney and counsel. Two of the notes are made payable to the order of the plaintiff, by the name and description of "George R. Davis, receiver of the Watervleit Bank," and three of the checks are signed "George R. Davis, receiver, &c." The plaintiff testified that the loan of the money upon these checks was an individual transaction between him and the defendant. The loan of all the checks, and their payment by the bank, was proved by the plaintiff. Neither of the loans was disputed by the defendant on the trial, except that of the \$400 check. The plaintiff testified that the defendant held a note against one Gilbert for \$200, which he turned over to the plaintiff, to be applied, when paid, upon the plaintiff's account against him, and the plaintiff left the note at his bank for collection. Afterwards, and before this note was due, the defendant applied to the plaintiff for a loan of \$400, and was answered by the plaintiff that he had not so much money in the bank. The defendant then assured the plaintiff that this Gilbert note (calling it \$250) would be paid, and he promised to deposit sufficient to make up the \$400, and thereby induced the plaintiff to give him his check for the \$400, which check was paid. The Gilbert note was paid, and a deposit made by the defendant in the bank, to the plaintiff's credit, of \$151, September 20, 1851, and the check was paid on the 22d day of September, 1851. The Gilbert note and deposit together amounted to \$351, thus leaving a balance of \$49 due the plaintiff on this transaction. The plaintiff

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testified that this check was loaned to the defendant on the 19th September, 1851. On the trial the defendant denied ever having received this check. The defendant testified to payments made by him to the plaintiff. These payments are all credited to the defendant in the statement made by Vanderheyden, except the one of \$81 allowed on the plaintiff's claim for legal services. Jabez Gilbert, a witness for the defendant, testified that he did business with the defendant at Rome, Oneida county, on the 19th of September, 1851. He thinks the defendant came to his house, in Pulaski, the night before; stayed all night, and went to Rome the next morning. The defendant testified to the same thing, and that he went from Rome to Syracuse. It also appeared that in May, 1863, the parties got together to settle and strike a balance, so far as related to their money dealings; each made out a statement of his claims, and they went together to the house of Mr. Vanderheyden, a practical accountant, and employed him to compute the interest and strike the balance. Vanderheyden took from each a memorandum of his claim. The items presented by each party were acquiesced in by the other. The defendant did not object to any item of the plaintiff's claim, and this claim included the \$400 check, and each of the other checks, as well as the notes above mentioned.

The referee found that the defendant gave notes to the plaintiff in his individual capacity; also, that on the 22d of October, 1849, the plaintiff loaned the defendant \$342, and took his note payable to "George R. Davis, receiver of the Watervliet Bank," and that the plaintiff indorsed it "George R. Davis, receiver &c.," and that the plaintiff was the owner and holder of the note. He further found that on the 23d of January, 1851, the plaintiff loaned to the defendant \$72 of money in the hands of the plaintiff as receiver of the Watervliet Bank, but as between the plaintiff and defendant it was an individual transaction.

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That on the 25th of February, 1851, he in like manner loaned the defendant \$333, from money in the plaintiff's hands as receiver, but it was an individual transaction as between the parties. That on the 22d of September, 1851, the plaintiff loaned to the defendant \$400, by giving a check for that amount upon funds deposited by the plaintiff as receiver, in the Bank of Troy. In part payment of this, the defendant gave the plaintiff a note of one Gilbert for \$200, and deposited to the plaintiff's credit as receiver \$151, leaving due \$49. That on the 6th of October, 1851, the plaintiff loaned to the defendant \$150, and took his note payable to "George R. Davis, receiver of the Water-vliet Bank," or order, which was indorsed "George R. Davis, receiver &c.," and that the plaintiff owns it in his individual capacity. The referee also found that the plaintiff had performed various professional services for the defendant, and among others, in an arbitration with Hiram Slocum, of the value of \$500; that in the case between the defendant and Hiram Slocum the arbitration was commenced, and the plaintiff employed, while he was carrying on law business alone, but that before its termination the plaintiff had formed a partnership with William W. Whitman; but the larger portion of the services of the plaintiff in that case were performed before the partnership. The referee rendered a decision allowing the plaintiff to recover in his individual capacity for all the moneys loaned, and also for the fee of \$500 in the Slocum arbitration. Exceptions were taken upon the trial, and to the referee's report, which are stated sufficiently in the opinion.

Judgment was entered, and the defendant appealed to the general term of the court.

John H. Reynolds, for the appellant, (defendant.)

Beach & Smith, for the respondent, (plaintiff.)

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MILLER, J. It is objected that the plaintiff was not entitled to recover the amount of the several notes payable to his order as receiver of the Watervliet Bank, and the sums loaned, for which checks were given by the plaintiff as such receiver, for the reason that he showed no title to them, and that they were the property of the plaintiff as receiver, and did not belong to him individually.

I am inclined to think that the objection is not a valid one, and that no error was committed by the referee in allowing these items.

As to the notes, it appears that they were indorsed by the plaintiff as receiver, and thereby the title to them was transferred to him. This fact is apparent from the copies of notes and indorsements introduced in evidence, and the finding of the referee on this point, to which no exception was taken. By the indorsements the title, *prima facie*, became vested in the plaintiff, and, in the absence of any proof to the contrary, the plaintiff would be entitled to prosecute them in his individual character. They were received in evidence, with the indorsements, without any objection being made that the indorsements were not proved, or any point being taken on that account; and the fact that the plaintiff had used money in his hands as receiver in making some of the loans on the notes, would not, I think, of itself be sufficient to establish that they did not belong to him individually. It may also be observed that there was evidence to show that they were presented by the plaintiff as an individual claim against the defendant, and were recognized by him as such, no objection being made on that account, on the occasion of the meeting of the plaintiff and defendant for the purpose of having their accounts looked over. The referee has also found that the plaintiff held the notes in his individual capacity, and I am not prepared to say that the finding is not supported by sufficient evidence.

As to the checks, they were introduced as evidence of

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the loans made, and although signed by the plaintiff as receiver, yet the testimony of the plaintiff shows—and there is nothing to contradict it directly—that they were individual transactions. It may well have been the case, that the amount drawn by him as receiver upon these checks was a portion of his fees, and, actually belonged to him.

The parties seemed to consider the transaction as an individual matter, and it was so treated by both of them. There is certainly no evidence which establishes that the defendant in receiving this money considered that he was dealing with the plaintiff as receiver. Such a theory is also contradicted by the fact, that these, with other items of the accounts between the parties, were included in the statement made by Mr. Vanderheyden, to whom the accounts had been submitted for the purpose of being examined, and with a view of having a balance struck, at the request of both parties, and that there was no serious dispute in regard to them.

The allowance of the check of four hundred dollars is especially objected to upon the ground that it was never had by the defendant. I think it was properly allowed. The defendant swears that he never had the check, and that on the 19th of September, 1851, the day it bears date, he was not in Troy, but at Rome, in Oneida county. He is supported by the witness Gilbert, who testifies that the defendant was at Rome on the 19th, having, as he thinks, stayed with him the night previous. The plaintiff, on the other hand, testifies with great positiveness as to the loan of the money and the delivery of the check, and gives the particulars connected with the transaction, and states the manner in which it was to be paid. His recollection is sustained by a memorandum made by him at the time, containing a statement of the matter.

In addition, it appears that this was one of the items contained in the plaintiff's account left with Vanderheyden

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to strike a balance, and that no objection was made to it by the defendant at the time when it was presented. Looking at probabilities, it is possible that the check may have been obtained prior to its actual date, thus rendering the proof as to the defendant's absence from Troy of no consequence.

But in any view which may be taken of the testimony, it is manifest that it was conflicting, and as it is not entirely preponderating in favor of the defendant, the finding of the referee is conclusive.

I also think there was no error in allowing the plaintiff to be asked, whether the loan of \$400 was an individual transaction. Also in asking, whether the plaintiff loaned the money as his own or as receiver. Both of these inquiries embodied a fact within the knowledge of the plaintiff, and did not, I think, require the expression of an opinion upon the law of the case. The plaintiff, above all others, was in a position to know how the fact was.

I have had considerable hesitation whether the plaintiff was entitled to recover the five hundred dollars claimed for his services in the case between Slocum and Peck. The plaintiff was employed alone, and before the termination of the suit, but after a greater portion and nearly all the services had been rendered, he formed a partnership with another person. The evidence does not show that any part of the services were actually performed after the formation of the copartnership, and the plaintiff would clearly be entitled to recover for what services he did render personally prior to its formation. It is, perhaps, questionable whether the defendant should not have pleaded the nonjoinder of the plaintiff's partner, if he desired to avail himself of that fact. (*See* 31 Barb. 239.) But the contract as to the services was between the plaintiff and the defendant, and although the plaintiff subsequently took in a partner, I think that this fact alone did not affect the relationship previously existing between the

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plaintiff and defendant. When an attorney is employed by a party, the law implies a contract between them; and before a new partner can be made a party to the contract, there must, I think, be some agreement or understanding to place him in a position which would entitle him to make a claim against the client who originally did not employ him. As there is no proof of any such agreement, or of the substitution of the firm as the attorneys or counsel of the defendant, I am inclined to think that the relation of attorney and client did not subsist with the new firm by the assent of the defendant, and therefore the plaintiff was entitled to recover for these services by virtue of his contract with the defendant. (*Ayrault v. Chamberlin*, 26 Barb. 83.)

I discover no error in any of the decisions made by the referee upon the trial, and I think the judgment should be affirmed, with costs.

HOGEBROOM, J. I am not quite satisfied, without further examination, as to the \$500 for professional services in the Slocum case. Evidently a part of the amount belonged to Whitman, and I think such amount cannot be recovered by Davis. Peck swears he employed Davis and Whitman. Whitman swears they were employed. At first, thinks they were employed before arbitration commenced; afterwards seems to doubt about it. Davis swears most of the services were performed before the partnership. Assume that this is so, I think Davis could not alone recover for the residue, because the testimony shows that Peck employed or adopted both of them afterwards in the transaction. As the plaintiff has not made the matter clear, I incline to think he should consent to deduct \$245, (and interest thereon,) which is \$5 less than half of \$500, or else that a new trial should be granted, and that neither party should have costs of appeal. Besides, were not both of the questions at folio 78 erroneously over-

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ruled? I incline to think so. As to the residue of the case, although the plaintiff has been pretty liberally dealt with, I do not know that there are legal objections on which we can set aside the report.

PROCKHAM, J. I concur in affirming the judgment. There is no ground, in my judgment, whatever, for disallowing the plaintiff's fees for professional services in the Slocum case.

Judgment affirmed.

[ALBANY GENERAL TERM, March 4, 1867. *Prockham, Miller and Hoyboom*, Justices.]

ADEE vs. DEMOREST & SIMONS.

A referee found, as matter of fact, that the plaintiff, on the 2d of July, 1864, shipped to the defendants 8880 bushels of oats, the property of the plaintiff; that the defendants received the oats, sold them for \$3225.67, after deducting charges and commissions, and refused, upon demand, to pay such proceeds to the plaintiff; *Held* that this made out a clear cause of action, and warranted a conclusion of law that the plaintiff was entitled to recover.

Held, also, that the plaintiff having given evidence tending to show that the oats in question were his property, and the defendants having given evidence tending to disprove the plaintiff's case, and to show that the oats belonged to them, and to make out a defense to the action; and the referee having believed the plaintiff's witnesses, and found in his favor upon the facts, and thus by implication negatived the defense; the report in favor of the plaintiff was not only an express finding, upon the facts, in his favor, but was in legal effect a finding against the defendants, that the defense was not established, and that no facts were proved by them which warranted a finding in their favor, upon the whole issue.

Before the court can reverse a judgment rendered by the referee, in such a case, it must, upon a review of the testimony, come to the conclusion that his finding upon the facts is against the clear weight of the evidence, precisely as it would hold—if the case had been tried by a jury, and their verdict, upon the same facts, was for the plaintiff—that such verdict was not warranted by the evidence.

The plaintiff having proved that the precise quantity of oats mentioned in the report had been delivered by him at the warehouse of H., the shipper, at or before the time of the shipment of such oats, and he producing the shipping

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bill of said oats, signed by H., showing the shipment of that quantity of oats on board a canal boat owned by H. and others, for and on account of the plaintiff's consignee, to the care of the defendants; *Held* that these facts clearly established, *prima facie*, at least, that the oats in question were the property of the plaintiff and had been received by the defendants as his consignees, or for his use and benefit.

Of these oats the defendant proved that 1253 bushels were not in fact the identical oats delivered by the plaintiff to H. and placed in store in his warehouse, but were in fact other oats purchased by W. with money obtained upon drafts drawn by him on the defendants. *Held* that upon the proofs the referee was warranted in finding that 1253 bushels of the plaintiff's oats were lent to W. and used by him; and that of the oats shipped to the defendants the same number of bushels were received and taken from W.'s oats in return for, or repayment of, the oats so lent.

That upon these facts there was no reasonable ground of doubt that H. & W. were jointly interested in the operation of buying and shipping oats, and that H. did, therefore, in borrowing and paying oats, in their common business and for their common benefit, bind both parties.

That H. therefore might lawfully, with W.'s assent, pay these 1253 bushels of oats to the plaintiff, and might lawfully ship them for him, and give and make a bill of lading, or shipping bill, in the name of the plaintiff. And that the referee might find that such were the facts, and such the true transaction.

Oats were purchased by W. from various persons, under an agreement between him and the defendants that such oats should be consigned to the latter; they were paid for by drafts drawn upon the defendants; but there was no agreement for a lien by the defendants upon the property to be purchased by W., or that the title should be in them from the time of the purchase. *Held* that the defendants had no title to the oats so purchased, and no lien thereon, until they were consigned to them by W.

Until consignment, in such a case, the lien of the consignee does not attach.

Upon a judgment rendered by a referee, or a single judge, the court reviews the facts as well as the law, and upon the same principles which govern the review of the verdict of a jury. *Per* E. D. SMITH, J.

APPPEAL by the defendants from a judgment entered upon the report of a referee.

The complaint in this action alleges that on the 2d day of July, 1864, at Starkey, Yates county, the plaintiff shipped on board the canal boat Joseph Carley, then lying in the Seneca lake, 3880 bushels of oats, the property of the plaintiff, to the plaintiff at New York, to the care of the defendants, by the firm name of Demorest & Simons,

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32 Moore street, they being commission merchants. That said oats so sent were received by the defendants, and by them sold at one dollar per bushel, amounting to 3880 dollars. That the plaintiff had demanded the money of the defendants, who refused to pay the same or any part thereof to the plaintiff, and had converted the same to their own use. Judgment for \$3880 was demanded, with interest from the 15th of July, 1864, and costs.

The defendants by their answer allege that the defendants in 1863 and 1864 did business with George W. Wilmot, of Starkey, receiving from him shipments of grain, &c., and making advances on such shipments. That in the course of the business Wilmot became, and, at the time mentioned in the complaint, was largely indebted to the defendants for advances on the faith of grain to be shipped to them. That M. A. Hollister, wife of A. Hollister, was interested with Wilmot as partner in some of the shipments and liable with him for a part of said indebtedness, and in a sum exceeding the value of said grain mentioned in the complaint. That before the time mentioned in the complaint, and about the forepart of June, 1864, Wilmot, individually, or as partner with Mrs. Hollister, owned and had in his possession the oats mentioned, and promised the defendants to ship the oats to them; the proceeds to be applied on said indebtedness. That the oats, at the time and place mentioned in the complaint, on the boat Carley, (being the boat of Wilmot,) were, by the procurement of Wilmot, shipped and transported to New York, as stated in the complaint, and received by the defendants as the oats of Wilmot, individually, or as partner as aforesaid, to be sold, and the proceeds applied as aforesaid. That the oats were the property of Wilmot, individually or as partner, and were not at any time or place the property of the plaintiff. That on the receipt of said oats, pursuant to the authority of Wilmot, the defendants sold the oats at one dollar per bushel. The proceeds were

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\$3525.67, after deducting the charges and commissions, and thereupon, pursuant to like authority of Wilmot, the proceeds have been rightfully retained by the defendants to apply on said indebtedness. The defendants admit that they refused to pay the proceeds to the plaintiff upon his demand.

The action was referred to S. H. Welles, referee, to hear and decide, and was brought to a hearing on the 23d day of August, 1865.

On the trial the shipping bill was introduced and proven on the part of the plaintiff. It was as follows:

"Shipped, Starkey, July 2, 1864, on boat Joseph Carley, Capt. H. Wilmot,

HORACE ADEE,
New York.

Care Messrs.

Demorest & Simons,
32 Moore St., N. Y.

Thirty-eight hundred
and eighty bus. Oats.
3880. 124,160 lbs.
Capt. collect seven
and a half cents (7½c.)
fr't. and insurance,
\$291.00.

HORACE ADEE,
Per Hollister."

It was proved that A. Hollister, in 1863 and 1864, was engaged in the commission and forwarding business; that the plaintiff had the oats specified in the shipping bill (3880 bushels, 6 lbs.,) in his warehouse at Starkey. A part of the oats were in the warehouse on the 10th of March, 1864, and part not. 1253 12-32 bushels were in the warehouse the year previous and were lent to Wilmot. That the 1253 bushels were returned by Wilmot at the time of shipping the oats, 2d July, 1864, and the 3880 bushels were shipped by Hollister for the plaintiff on board of the boat Joseph Carley, for the plaintiff. It also appeared in evidence that Hollister & Wilmot were owners of the boat upon which the oats were shipped. The referee, after hearing the proofs and allegations of the parties,

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duly made and signed his report, in and by which he found: 1st. That the defendants were partners as commission merchants in New York, in 1864. 2d. That on the 2d of July, 1864, the plaintiff, at Starkey, shipped on board the canal boat Joseph Carley 3880 bushels of oats, the property of the plaintiff, directed to the plaintiff, to the care of the defendants. That the oats were received by the defendants about the 23d of July, 1864. 3d. That the defendants sold said oats about the 1st of August, 1864, and received \$3525.67, after deducting their charges. 4th. That after such sale the plaintiff demanded of the defendants the proceeds, and the defendants refused to deliver the same.

As a conclusion of law, the referee found and decided: That the defendants were indebted to the plaintiff in the sum of \$3525.67, with the interest thereon from the 1st of August, 1864, amounting at the date of his report to \$267.32, and that the plaintiff was entitled to judgment against the defendants for \$3792.99, besides costs. Upon which said report judgment was duly entered for damages \$3792.99, and \$138.95 costs.

The defendants made a case containing exceptions, and appealed to the general term from said judgment.

E. P. Hart, for the appellants. I. The referee finds, as a fact, that the plaintiff, on the 2d day of July, 1864, shipped on board of the boat Carley 3880 bushels of oats, and that the same was the property of the plaintiff. It is submitted that there is no proof to warrant or justify this finding. 1. It is and must be conceded that the 1253 bushels of oats delivered in the fall of 1862, and which amount was included in the 3880, had been disposed of for over a year before the shipment in question. Adee had no title to this quantity of the oats, unless the arrangement with Hollister conferred such title, and we propose to show hereafter that it did not, either in point

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of fact or law. 2. As to the oats delivered in the fall of 1863, and forepart of the year 1864, it is alike conceded that these oats were all disposed of by Hollister, on his own account, in January and February, 1864, except 600 or 700 bushels. The quantity of oats then delivered was 2627 bushels. How then did Adee get title to the 2000 bushels which had been taken away—converted by Hollister? Hollister does not pretend that he had any authority from Adee to sell those oats to the government. Upon the proof it is an unmitigated conversion by him of the plaintiff's grain, and it is patent and apparent from the whole case, that to excuse himself from liability to the plaintiff (assuming that there was no collusion between the two) he appropriated the defendant's grain to his own use, by turning the same over to the plaintiff. It is not pretended that Hollister owned this grain with which he made the substitution, nor is it alleged or proved that any arrangement was made between them, or that Wilmot was ever consulted, or consented to the taking 2000 bushels of oats out of the load in payment for those which Hollister had sold to the government, and which were drawn to his warehouse by the plaintiff. There is not a particle of proof to show that the plaintiff owned or had title to the 2000 bushels of oats thus changed or substituted by Hollister. A summary of the facts, or the evidence in detail, shows the transaction to be:

That in the fall of the year 1863 the plaintiff delivered, or caused to be delivered, at the warehouse of Hollister's wife, at Starkey, 2627 bushels of oats. They were soon after converted by Hollister. Subsequent to such conversion, Wilmot brings and stores in the same warehouse a large quantity of oats, so that on the 2d day of July, 1864, 3100 bushels remain there. It is then resolved by Wilmot to send a cargo of oats to the defendants, to enable them to meet their large acceptances to raise money to purchase this grain. The boat is then sent to Shingle

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Point, Lodi, North Hector, Peach Orchard, Watkins, Big Stream, and finally brings up at Starkey and completes the load, making an aggregate of 10,541 bushels. By a single dash of his pen, Hollister attempts to transfer to the plaintiff 3880 bushels, undistinguished of this cargo, although he knew that the defendants had accepted drafts upon the faith of this consignment. He had used the proceeds himself, and, in fact, but two or three days before commencing the loading of those oats, he discounted at Stafford's Bank, at Dundee, Wilmot's draft of \$2000, accepted by the defendants, and which they subsequently had to pay, and the plaintiff himself received \$1450, part of the proceeds of the draft. Upon this state of facts, we submit that it is unwarrantable to find that this plaintiff was the owner of the oats, beyond the 600 or 700 bushels.

3. The evidence is wholly insufficient to authorize the finding that the 1253 bushels belonged to the plaintiff. Assuming all that Hollister states to be true, it fails to show a transfer of title from Wilmot to the plaintiff. Hollister swears that about the time that the boat was being loaded, he spoke to Wilmot about returning the Adee oats. Wilmot replied: "They are ready." This is all the conversation on the subject, all that Wilmot ever said. In what manner do these words indicate a sale or transfer of 1253 bushels of oats, belonging to Wilmot, to the plaintiff? or where was the grain which was to be transferred? Was it at Shingle Point, or at either of the other places along the lake? Was there any consent or direction by Wilmot, that any part of the oats put on this boat (Carley) should be used in the repayment of oats which Hollister pretends were borrowed? Upon this proof, or rather no proof at all, the referee should have found that this 1253 bushels of oats did not belong to the plaintiff, and more especially as Wilmot did not concur in the story of Hollister.

II. For the purposes of this case it must be assumed

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that in the year 1862 an agreement was made between Wilmot and the defendants, by which the defendants agreed to accept Wilmot's drafts; that with the proceeds of these drafts Wilmot was to purchase grain and ship the same to the defendants; that at maturity the drafts were to be paid by the defendants; that, relying upon this agreement, and the performance thereof by Wilmot, they did accept drafts to a very large amount. The defendants, upon the trial, offered to prove these facts, the proof of which was excluded by the referee. 1. We insist that under the proof given, and that offered, the title to the oats, when bought by Wilmot, was in the defendants; that Wilmot is to be regarded as acting, in the purchase, as the agent of the defendants, and being the owner, Hollister had not the right to transfer the title to another, particularly when he swears that he had no interest in the grain shipped, and that neither he nor his wife was at this time connected in business with Wilmot. It was entirely competent for the defendants and Wilmot to agree that drafts should be accepted by the defendants, the proceeds of which should be used in the purchase of grain, and that as an indemnity for such indorsements and the payment of the drafts, the grain should be shipped to the defendants. The defendants, under such an agreement, have something more than a mere lien. They are the owners against all persons except *bona fide* purchasers, and have such a vested interest as authorizes them to maintain an action for a conversion. (*Halle v. Smith*, 1 Bos. & Pul. 563. *Bryans v. Nix*, 4 Mees. & Wels. 775. *Dows v. Cobb*, 12 Barb. 310. *Adams v. Bissell*, 28 id. 382. *Grosvenor v. Phillips*, 2 Hill, 147. *Feize v. Wray*, 3 East, 93.) 2. Every consignee or factor has a lien on, or property in, the goods shipped, to the extent of his advances, and the moment the goods are placed on board, the lien on property attaches. (*Brown v. Hodgson*, 2 Camp. 36. *Stan-ton v. Eager*, 16 Pick. 467.) Especially when advances have

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already been made, under an arrangement that property shall be consigned. This proposition does not conflict with the rule that a factor has only a lien upon goods that come into his possession, which rule is laid down by elementary writers, and referred to in the case of the *Bank of Rochester v. Jones*, (4 N. Y. Rep. 497.) In the case cited, Jones had a balance against Foster for advances on prior consignments, and sought to hold the property as an indemnity for such balance. Foster, at the time of the shipment, drew a draft upon Jones against the grain shipped. Jones refused to accept it. No bill of lading had been sent to Jones. Upon such refusal the consignor, upon the bill of lading, obtained an advance from the Rochester bank, and the bank brought an action of trover against Jones for the conversion. The court held that Jones' right to the possession of the property depended upon his acceptance of the draft. That as he had refused to accept, and no bill of lading being sent to him by Foster, he had no right to the property as against the bank, who had advanced money upon the bill of lading, and the bank was to be regarded as a *bona fide* purchaser. That the possession of Jones was illegal and wrongful. But the court say, on page 500: "But as such receipt or bill of lading was neither sent or delivered to him by Foster, he acquired no title to the property, nor any right to receive or sell the same. There was no agreement existing between Foster and Jones which obligated the former to send all of his flour to the latter, to be sold by him for the reimbursement of his advances made on the credit of flour, to be consigned to him by Foster." The rule for which we contend is thus recognized, that such an agreement as we proposed to prove in this case, obligated Wilmot to send his grain to the defendants to enable them to reimburse themselves for their advances. And it is this feature of the case at bar, that distinguishes it from the case and rule claimed by the plaintiff. 3. The acceptances and payment

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of drafts by the defendants upon the faith of property to be consigned to them, not only gave them a vested right to the property, but changed their relations to Wilmot and their remedy against him. In such a case the defendants are not regarded as accommodation acceptors for Wilmot; the proceeds of the sales of the property received by them is the primary fund for their reimbursement, for their acceptances and payments, and they have no remedy against Wilmot, until they show that the proceeds of the property were insufficient to reimburse them. (*Gihon v. Stanton*, 9 N. Y. Rep. 476. *Mottram v. Mills*, 2 Sandf. 189.) Now if these oats were owned by Wilmot, that is, those put on at Starkey and sent by Wilmot, in the usual course of business, to the defendants, Wilmot has the right to require the proceeds of the sales to be applied upon the drafts. In fact it was the legal duty of the defendants so to do, unless Wilmot consented to the arrangement made by Hollister, of which there is no pretense. Upon the delivery of the oats to Wilmot the defendants became liable to Wilmot for their value, and being liable to him, most certainly they are not liable to the plaintiff. The plaintiff's remedy is against Hollister for the conversion of his oats, and it is not admissible to allow Hollister to dispose of other men's property to pay his own liabilities. 4. The claim in this case, that because the oats were shipped in Adee's name, the defendants could have no right of sale, is untenable, for the reasons: (a) There is nothing in the case to show that the defendants had any knowledge of the manner of shipment. No bill of lading was sent them, or any information apprising them that any part of the cargo belonged to Adee. Hollister swears that but one shipping bill was made out, and that was given to the captain of the boat, Wilmot's son. (b) These oats were received in the ordinary course of prior dealings between the parties, and Wilmot swears that he heard nothing of oats being shipped for Adee, until after they

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were shipped; and hence no consent to the shipment in Adee's name was obtained from him. (c) The moment the oats was placed on board, the defendants acquired a special property therein, and the mere making of a bill of lading by Hollister, in the name of Adee, could not divert that property. The bill of lading was made out after the property was placed on board. (d) Hollister had no authority from Wilmot to ship the oats in Adee's name, and the plaintiff can acquire no right from the unauthorized act of Hollister. (e) The plaintiff is not a *bona fide* purchaser; he advanced nothing upon the cargo or the shipping bill. The defendants did advance upon the faith of the consignment: therefore their equities, as well as legal rights, are superior and paramount to any alleged claim of the plaintiff. 6. The mere fact that property is shipped in the name of a person, was not, at common law, nor is it by the statute relating to factors, conclusive, or scarcely *prima facie*, evidence that such person is the owner. The facility with which frauds at common law could be perpetrated, by a shipment in the name of a person who was not the owner, and his procuring advances thereon, and then the true owner asserting his title to the property, led to the passage of the various statutes, in England and this country, in respect to the consignment of property. Hence our statutes (*Laws of 1830, p. 203, § 2*) provide that every person in whose name merchandise is shipped, is to be deemed owner so far as to entitle a consignee without notice to a lien for money advanced, or negotiable security given, by such consignee, to or for the use of the shipper, or for money or negotiable security received by the shippers to the use of such consignee. It will be seen that this statute merely limits ownership in the shippers to the extent of protecting a *bona fide* consignee for advances &c. made by him, and does not declare, as claimed before the referee, (and as necessarily found by him,) that the bill of lading was conclusive evi-

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dence of ownership. But who were the shippers in fact in the case? It cannot be pretended that Adee was the shipper. On the contrary, it is undisputed in the case, that Wilmot, or at the most, Wilmot & Hollister, were the shippers. Hollister, in the shipment, used fraudulently another man's name as consignor. We insist that, under either of the provisions of the statute before referred to, as well as upon general principles, the defendants had a lien upon the property for their advances to the shippers in fact, and that the receipt or memorandum made by Hollister did not change the title to the grain. (*Holbrook v. Wight*, 24 *Wend.* 169. *Blossom v. Champion*, 37 *Barb.* 554.) The paper signed by Hollister was in no sense a bill of lading. (4 *Denio*, 323. 3 *Sandf. S. C. Rep.* 7. 28 *Barb.* 157.) It was not signed by the master of the boat. It was not delivered to Adee, and it appearing in the case that the property shipped was not the property that the plaintiff delivered at the warehouse, but was grain bought with the defendants' money, and for them, the referee should have held and decided that the mere fact of Hollister's making a memorandum that he shipped, in the name of Adee, 3880 bushels of oats, did not transfer to Adee, or change the title to, the grain.

III. 1. The referee erred in excluding proof offered by the defendants, viz., to prove the arrangement &c. under which the defendants accepted and paid the drafts in question. This is the essence of the defendants' claim to the grain. Wilmot buying this grain for the defendants under an agreement to send it to them to indemnify them for their acceptances, the moment that Wilmot got possession it became the possession of the defendants. (24 *Wend.* 169.) It was therefore material to prove the whole arrangement in order to show the right of the defendants to the grain, and when the right to have the grain delivered appeared, to submit that such right was paramount to any claim alleged by the plaintiff. 2. It was error in the referee to

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admit the paper claimed to be a bill of lading. It was not admissible for any purpose. It does not purport to be the shipping bill, or even a copy of it. It is a mere memorandum of Hollister; when made, does not appear. That it is not the bill of lading is evident; that the witness testified that he did not know what had become of it, and that he kept no duplicate. And it is upon this paper that the referee must have found that the oats were shipped in the name of Adee. 3. The referee admitted proof, under objection, as to the person for whom the oats were shipped. The bill of lading is the best evidence of who the consignor is; and as one was shown to have been given, that should have been produced, or its loss accounted for. In any view of the case, it became a very material question as to the name of the consignor in this bill of lading. If Wilmot was the consignor, under the proof, it can hardly be pretended that this action can be maintained, although Adee might have been the owner and directed the shipment. Adee's claim is founded entirely upon the fact that he was the consignor. In the plaintiff's view of the case, the rights of these parties would, in a great measure, depend upon who was the consignor, not in fact, but as expressed in the bill of lading. The primary proof, therefore, is the shipping bill itself, which should have been produced. 4. The exception in folio 45 is well taken. Hollister had sworn that Wilmot had told him the 1253 bushels of oats "were ready," and he *supposed* they were put on board, and upon that supposition he made out a shipping bill. It became a material inquiry whether Wilmot had put the oats on board. Hollister had no personal knowledge of the fact, and he was permitted by the referee to swear that Wilmot told him they were thus shipped. This is a violation of the plainest rules of evidence. The fact could not be proven by Wilmot's declarations. 5. The exception in folio 84 is well taken. It was competent to show that the

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defendants had no notice of any claim to the oats by Adee, either by the shipping bill or otherwise, and as the referee allowed proof that Adee's name was used as consignor, it was proper to show that there was nothing upon the bill of lading indicating a claim of ownership by Adee. It was proper for another reason, viz., that if these oats were consigned in the usual mode to the defendants upon Wilmot's boat from the Seneca lake, under the agreement proved, and sought to be proved, and upon the receipt of the cargo, in ignorance of any claim by the plaintiff, and in the supposition that the consignment was the same as it had been for several years prior thereto, the cargo was sold by the defendants, with the other proof in the case, it was competent, as bearing upon the question, whether there was a conversion of the grain by the defendants.

6. The referee erred in allowing Henry Wilmot to swear that the oats were shipped in Adee's name, for the reasons before stated. Why was not the shipping bill produced, or notice given to us to produce it? Ordinarily it would not make much difference as to the name of a party in a paper, but under the statute relating to factors it is very material, and hence the necessity of the production of the shipping bill, and it was a palpable error of the referee to allow parol evidence of its contents in such a vital part.

IV. That the oats rightfully came to the possession of the defendants, and that they had lawful right to sell, is not disputed. The complaint, as well as the finding of the referee, is that the defendants converted the proceeds of the sale. The questions are, to whom did the proceeds belong? and, was there a conversion of such proceeds? The first question has been considered. The referee finds that after the sale, the proceeds were demanded of the defendant. There is no evidence whatever of any demand or refusal. Before the action can be maintained, such demand must be proved.

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D. B. Prosser, for the respondent. The only question in issue under the pleadings is the ownership of the oats; the defendants by their answer having admitted the sale of the oats and the shipping thereof, as alleged in the complaint, but alleged that the oats belonged to Wilmot or Wilmot & Hollister.

I. The referee is fully sustained in the facts and conclusion of law found by the pleadings and evidence. The only material fact put in issue by the answer is the ownership of the oats; the defendants by their answer allege that the oats belonged to Wilmot or Wilmot & Hollister, and not to the plaintiff. The shipping the oats as mentioned in the complaint, and the receipt and sale thereof by the defendants, are admitted by their answer. The referee having found that the oats belonged to the plaintiff, as one of the facts found by him, his finding is conclusive unless clearly contrary to evidence. The testimony of A. Hollister and the plaintiff fully sustains the referee in his finding that the oats belonged to the plaintiff. The plaintiff at the time the oats were shipped had in store with Hollister 3880 bushels of oats, including the 1253 bushels lent to Wilmot in May, 1863. When the plaintiff called upon Hollister, the warehouseman, for his oats, the oats in question were put on board the boat for him, and shipped in his name, by Hollister, as directed by the plaintiff. Wilmot testifies that Hollister was interested with him in all the oats shipped in 1863. Hollister was the acting man—took charge of the business. It is wholly immaterial whether the 1253 bushels were lent to Wilmot or Wilmot & Hollister. Wilmot testifies that the oats were shipped by the company in July, 1864; that is, by himself and Hollister. Wilmot in his evidence does not claim the oats as belonging to him. On the contrary, he testifies that the boat belonged to him and Hollister, and the oats were shipped by the company. If Hollister and Wilmot were in company and jointly interested in the oats

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and in the boat upon which they were shipped, Hollister, the acting man, having shipped the oats in the name of the plaintiff, on account of that quantity being in store or received in store for the plaintiff, they certainly could not, after that, claim the oats or the proceeds arising from their sale. As between the plaintiff and Wilmot, or Wilmot and Hollister, the plaintiff's title to the whole of the oats was perfect and complete. The defendants, not having parted with any thing upon belief that the oats belonged to Wilmot or Wilmot & Hollister, are in no better condition than Wilmot & Hollister would have been in case they had sold the oats and received the pay.

II. The referee's rulings on the hearing, on the receipt and rejection of evidence, was not erroneous, and none of the exceptions taken to his rulings can be sustained. 1. The shipping bill was rightfully received in evidence, It was competent for the plaintiff to prove when and in whose name the oats were shipped. It may not have been absolutely necessary to make the proof, inasmuch as the shipping of the oats, alleged in the complaint, is admitted by the answer. It certainly could not prejudice the defendants to prove what they had admitted. 2. The evidence in relation to the lending and return of the 1253 bushels of oats was part of the evidence which tended to prove the plaintiff's title to the oats. 3. The referee was clearly right in refusing to limit the inquiry on the part of the plaintiff to the oats actually on hand or in store belonging to the plaintiff at the time of the shipment, in July, 1864. Such limitation would have excluded the 1253 bushels returned by Wilmot for those lent in 1863. 4. Wilmot & Hollister owned the boat on which the oats were shipped, and the shipping was done by Hollister. It was therefore clearly competent for the plaintiff to prove by Hollister for whom he shipped the oats. The shipping bill had been proven and given in evidence. The evidence did not tend to contradict the shipping bill, and therefore

could not affect the defendants, even if it were unnecessary. 5. The evidence in relation to the return of the 1253 bushels, and what Wilmot said to Hollister about having part of them on his boat, was properly received in evidence. It was a part of the *res gestæ* of the transaction relating to the return of the oats lent to Wilmot. 6. The referee was right in overruling the objection to the question put to Hollister by the plaintiff, whether he, (Hollister,) after having been told by Wilmot that he had put the oats on the boat, informed the plaintiff that he had shipped them. After the plaintiff had applied to the witness to ship the oats, it most clearly was competent for the plaintiff to prove by Hollister that he (Hollister) informed him that he had shipped them. 7. Any agreement or understanding had or made between the defendants and Wilmot prior to the shipping of the oats in question by the plaintiff, cannot in any way affect the rights of the plaintiff. The evidence of the agreement between the defendants and Wilmot was properly rejected by the referee. Proof of the agreement could not tend to show that Wilmot or Wilmot & Hollister were the owners of the oats in question. The only proper inquiry was as to who owned the oats in question. 8. It was wholly immaterial whether the oats which came into the possession of the defendants in the course of their business with Wilmot were paid for by the defendants or not. The referee was correct in sustaining the objection made by the plaintiff. The question was not whether the oats had been paid for, but it was, who was the owner? Proof that the defendants had paid for the oats would not have tended to show whether Wilmot or the plaintiff owned them. 9. The reason why the defendants accepted and paid the drafts drawn upon them by Wilmot was wholly immaterial. The accepting and paying the draft by the defendants would not tend to prove that Wilmot or Wilmot & Hollister owned the oats, as alleged in the answer. The referee therefore was right in

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sustaining the objection to the evidence. There was no evidence given or offered which tended to prove that the oats in question, or any part of them, were paid for with the proceeds of the drafts drawn by Wilmot upon the defendants and accepted and paid by them. 10. The supposition and belief of the defendants, at the time they received and sold the oats, was wholly immaterial. Their supposition and belief did not tend to prove who owned the oats. The evidence of their supposition or belief was properly rejected by the referee. The defendants did not claim or pretend that they had parted with any thing upon the receipt of the oats, and even if they had, that would not affect the right of the plaintiff, as the shipping bill informed them that the oats belonged to the plaintiff. 11. The question whether the oats were received and sold by the defendants, and the proceeds applied in the business with Wilmot in ignorance of the plaintiff's claim, was immaterial to the issue. Their ignorance of the plaintiff's claim would not tend to prove that he was not the owner. Proof that the oats had been received and sold in ignorance of the plaintiff's claim would not in the least affect the plaintiff's right or title to the oats, or tend to prove that Wilmot owned them. 12. The witness Hollister was not bound to state how he had testified on a former occasion. The referee therefore properly ruled that he was not bound to answer the question as to how he testified in 1862. (*The People v. Bodine*, 1 *Denio*, 281. *Mitchell v. Hinman*, 8 *Wend.* 667.) 13. The declaration of Hollister to the witness Henry Wilmot was properly excluded by the referee. His declarations were not evidence against the plaintiff. They could only be resorted to for the purpose of impeaching Hollister, after the question had been put to him and answered, and then only when it related to a material point. 14. It was competent for the plaintiff to ask the witness Henry Wilmot, on his cross-examination, after he had testified that at the time of the shipment of the oats, "he

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had no knowledge that the plaintiff had any claim or interest in the oats, except what he derived from Hollister," whether the shipping bill did not show that the oats were shipped in Adee's name. The objection to the question was properly overruled and the answer received. The answer could not in any way or manner affect the right of the defendants; it was not for the purpose of proving the contents of the shipping bill that it had been given in evidence. 15. The proof offered by the defendants, by the witness Booth, which was excluded by the referee, was wholly immaterial, and did not in any way tend to prove the issue. It certainly was immaterial how the account of Hollister was made up at the bank, or what items composed the account. It is equally immaterial whether, in the spring of 1864, the bank did or did not discount drafts drawn by Wilmot on the defendants, indorsed by Hollister or Mrs. Hollister. The discounting drafts drawn by Wilmot on the defendants, indorsed by A. Hollister or Mrs. Hollister, would not tend to prove that the oats in question did not belong to the plaintiff, or that they belonged to Wilmot. It was wholly immaterial how many drafts were discounted for Hollister in 1863 and 1864. 16. The referee was right in excluding the examination of Hollister taken in 1862, in the supplemental proceedings. It was wholly irrelevant, and related to matters which had no connection with the oats in controversy in this action, and was taken before any of the oats were delivered by the plaintiff to the warehouse of Hollister. It was taken the 18th of November, 1862, and related wholly to previous transactions.

III. The exceptions to the report of the referee are none of them well taken, because: 1st. The finding of facts by a referee are not the subject of exceptions. 2d. Under the pleadings and facts found by the referee, his conclusions of law are most clearly right and according to law. Any other or different conclusions of law could not be sustained.

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By the Court, E. DARWIN SMITH, J. The conclusion of law upon the facts found by the referee is clearly correct. The referee finds as matter of fact that the plaintiff, on the 2d of July, 1864, shipped to the defendants 3880 bushels of oats, the property of the said plaintiff. That the defendants received the oats, sold them for \$3225.67, after deducting charges and commissions, and refused upon demand to pay such proceeds to the plaintiff. This makes out a clear cause of action. The defendants claim that the finding is erroneous in point of fact, and insist that the plaintiff was not the owner of said oats, but that the same were purchased on their account and with their money, and were their property. Upon a judgment rendered by a referee or single judge the court reviews the facts as well as the law, and upon the same principles which govern the review of the verdict of a jury. The plaintiff in this case gave evidence tending to show that the oats in question were his property, and the defendants also gave evidence tending to disprove the plaintiff's case and to show that the oats belonged to them, and to make out a defense to the action. The referee has believed the plaintiff's witnesses and found in his favor upon the facts, and thus by implication has negatived the defense. The report in favor of the plaintiff in such case is not only an express finding upon the facts in his favor, but is in legal effect a finding against the defendants that the defense was not established, and that no facts were proved by the defendants which warranted a finding in their favor upon the whole issue. Before we can reverse the judgment rendered by a referee in such a case, we must, upon a review of the testimony, come to the conclusion that his finding upon the facts is against the clear weight of the evidence, precisely as we should hold if the case had been tried by a jury, and their verdict upon the same facts was for the plaintiff, that such verdict was not warranted by the evidence. The plaintiff clearly shows that the precise

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quantity of oats mentioned in the report had been delivered by him at the warehouse of Hollister, the shipper, at or before the time of the shipment of such oats, and he produced the shipping bill of said oats, signed by the said warehouseman and shipper, showing the shipment of this quantity of oats on board of a canal boat owned by said Hollister and others, for and on account of the plaintiff's consignee, to the care of the defendants. These facts clearly establish, *prima facie* at least, that the oats in question were the property of the plaintiff, and had been received by the defendants as his consignees or for his use and benefit. Of these oats the defendants clearly proved that 1253 bushels were not in fact the identical oats delivered by the plaintiff to Hollister and placed in store in his warehouse, but were in fact other oats purchased by Wilmot with money obtained upon drafts drawn by him upon the defendants. Upon the proofs the referee was clearly warranted in finding that 1253 bushels of the plaintiff's oats were during the winter of 1863 and 1864 lent to Wilmot and used by him, and that of the oats shipped to the defendants, the same number of bushels were received and taken from Wilmot's oats in return for or repayment of the oats so lent. Upon these facts there is, I think, no reasonable ground of doubt that Hollister & Wilmot were interested in the operation of buying and shipping oats, (Wilmot himself, the defendants' witness, proves this fact,) and that Hollister did, therefore, in borrowing and paying oats in their common business and for their common benefit, bind both parties. I do not see, therefore, why Hollister might not lawfully, with Wilmot's assent, pay these 1253 bushels of oats to the plaintiff, and why he might not lawfully ship them for him, and give and make the bill of lading or shipping bill in the form produced and proved. Certainly the referee might find that such were the facts and such the true transaction.

The only question which remains, therefore, on this point,

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is whether the oats in question—these 1253 bushels—were in fact the property of the defendants or of Wilmot. If they were in fact the property of the defendants, Wilmot or Hollister, or both, could not transfer any title in them to the plaintiff, and the defendants have only received their own property. On this point I do not see that the defendants gave, or offered to give, any proof that would have warranted the referee in finding that the title to these 1253 bushels of oats before their shipment was in them. It is not pretended, and was not contended before the referee, that Wilmot was the agent of the defendants for the purchase of the oats; or that Wilmot & Hollister were such agents; or that such oats were purchased on their account as principals; except that they were purchased on an agreement between Wilmot and the defendants that they should be consigned to them. Simons, one of the defendants, was sworn as a witness, and testified that their firm, prior to July and August, 1864, had been doing business with Wilmot, accepting his drafts on the strength of consignments made by him to them. The witness further said that in the beginning, in 1861, “we told Wilmot that the property must be consigned to us, as we would have nothing to do with him unless the property were consigned to us, and he agreed to it.” The transactions, it appears, between these parties under this agreement were large, amounting at the time of the trial to upwards of \$200,000. But it does not appear from any thing I see in the evidence that there was any agreement for a lien by the defendants upon the property purchased by Wilmot, or that the title should be in them from the time of its purchase; and there is in the evidence nothing to warrant such a finding as matter of fact by the referee. Wilmot drew upon them as he had occasion, purchased produce with the proceeds of the drafts, and sent it to New York consigned to them to meet his drafts. The property was his, and the profits of the speculation were entirely

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his, if any were made; the defendants being entitled to retain from the proceeds of the sale of the property when sold the amount of their advances, interest and commissions and expenses. The defendants were mere commission merchants, and received and were to receive the property for sale as such, not as owners, or even as partners. They had no title to the property and no lien till it was consigned to them by Wilmot. Until consignment, in such cases, the lien does not attach. (*Brown v. Hodgson*, 2 *Camp*. 36. *Stanton v. Eager*, 16 *Pick*. 467.)

I do not see, therefore, how the referee could have found title in the defendants to the oats in question. It follows that the finding that the property was in the plaintiff was not unwarranted by the evidence, and we cannot reverse the judgment on the ground that the referee erred in his findings upon the facts and that his report for the plaintiff is against the weight of the evidence, or against the evidence. The judgment must therefore be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 2, 1867. J. C. Smith, E. D. Smith and Johnson, Justices.]

RICE, survivor &c., and others, vs. DEWEY.

If purchasers of land from a mortgagor have a right, as against the mortgagor, to have their land discharged from the lien of the mortgage, at the time of its transfer to an assignee, such right is equally available as against the assignee; the latter taking the mortgage subject to all defenses that existed against it in the hands of the mortgagor.

Parcels of land covered by a mortgage and originally subject thereto, will so continue, unless by some act of the mortgagee they are discharged. Whether the mortgagee considers them subject to the lien is immaterial, except so far as it may be evidence of some agreement, act or omission on his part, discharging the lien.

A mortgagor has the right to sell the mortgaged premises, in such parcels as he chooses; and knowledge by the mortgagee that he is making such sales

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and receiving the consideration therefor, will not discharge the lands sold from the lien of the mortgage.

When a mortgagee causes his mortgage to be recorded, he has done all that is required of him, to preserve his lien; and all persons purchasing from the mortgagor, subsequently, are bound, at their peril, to investigate the title and take notice of the mortgage. If they neglect to do this, neither law nor equity can relieve them from the consequences of the omission.

A finding, by a referee, that sales of land by a mortgagor were made and the consideration therefor received by him, with the *consent* of the mortgagee, implies something more than the mere non-action of the latter to prevent the sales. It implies that the mortgagee had entered into some agreement respecting his lien, whereby the lands purchased were discharged from the lien.

A declaration, by the assignee of a mortgage, that he did not suppose, when he purchased the mortgage, that it was a lien upon lots previously sold by the mortgagor, is of no consequence, except as tending to show an agreement, or act, of the mortgagee, discharging the mortgage.

So as to a promise by him that he will release one of the parcels of land conveyed by the mortgagor; and a declaration that the mortgagor's deed would be good, and that he (the assignee) is going to release several lots, and will have it all done at once; such declaration being only evidence from which it may be inferred that the mortgagee, or his assignee, has agreed to release the lots; provided such inference is warranted by the other evidence in the case.

Knowledge by a mortgagee of sales of land made by the mortgagor will not estop him from asserting the lien of the mortgage; neither will it estop his assignee.

A parol arrangement between mortgagor and mortgagee, by which the former is to execute a new bond and mortgage to the latter, leaving out the parcels of land sold by the mortgagor, is a mere verbal contract in regard to an interest in real estate; and being based upon no consideration, and in no part performed, is wholly nugatory, so far as the parties thereto are concerned, and cannot aid purchasers from the mortgagor, if not communicated to, and acted upon by, them.

Knowledge, by the assignee of a mortgage, that purchasers from the mortgagor are making improvements upon the lots conveyed to them, will not estop him from asserting the lien of the mortgage thereon. He has a right to presume that such purchasers have examined the records and know of the mortgage, and have obtained security satisfactory to themselves, against the lien.

No case can be found, holding that a mortgagee whose mortgage is duly recorded loses any right by neglecting to give personal notice of such mortgage, to a purchaser from the mortgagor. *Per GROVER, J.*

An *estoppel in pais* arises when a party has made representations, or done acts, to influence the conduct of another, by inducing a belief of a given state of

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facts, when such party, having acted upon such belief, would be injured by showing a different state of facts.

When lands sold and conveyed by a mortgagor are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of the mortgage as the land upon which they are made.

It is well settled that a new promise to pay is no defense to an action brought upon the original obligation, although expressly agreed to be taken as payment; the reason being that there is no consideration for the agreement to receive the new promise in payment.

When this reason does not apply, the rule no longer prevails. If any new or additional security, or other benefit, is obtained by the creditor, or any detriment sustained by the debtor, by the new arrangement, the defense is perfect.

Thus where promissory notes bearing interest are given and received in payment of interest due upon a mortgage, a demand not drawing interest being thus converted into a debt on interest, this is a good consideration for the agreement of the holder of the mortgage to accept the notes in payment.

APPPEAL by the defendant from a judgment entered upon the report of a referee. The action was brought to restrain the defendant from selling under a statute foreclosure certain mortgaged premises, in which the plaintiffs were severally interested as purchasers from the mortgagor.

On the 28th day of October, 1848, Elias S. Hedges executed his bond to Nathaniel A. Lowry, conditioned for the payment of \$5500 and interest, in future installments. To secure the payment of the bond, he at the same time executed a mortgage upon certain real estate, situated in and near Sinclearville, Chautauqua county. The mortgage was duly recorded January 31st, 1849. On the 3d day of March, 1849, the mortgagor conveyed to Mark Crawford, the intestate of the plaintiffs Crawford and Blanchard, eighteen acres of the mortgaged premises for \$875; \$200 was paid down, and the residue, \$675, was secured by the bond and mortgage of the purchaser.

On the 4th March, 1850, Hedges conveyed to the plaintiff Ezra Brown five-sixths of an acre of the mortgaged premises, for which Brown paid him at the time a price

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of \$150. On the same day Hedges conveyed to the plaintiff Sylvanus Pickard about two-thirds of an acre of the same for \$150, then paid to him. In the fall of 1850 Martin B. Crawford made a parol contract with Hedges for two-thirds of an acre of the premises at a price of \$150, and in the summer of 1851 paid him \$133 in work on the same. In the spring of 1852 Crawford sold his interest in the land to Merchant, by a parol contract of sale, for the same he gave. Crawford at the time informed Merchant respecting the mortgage upon the premises. Hedges conveyed to Merchant, October 8th, 1852. In April, 1853, Merchant conveyed to the plaintiff Copp. Soon after his purchase, Crawford improved his premises to the value of several hundred dollars. In the summer and fall of 1850 Brown erected improvements on his lot of the worth of \$1400, and Pickard did the like in the same summer in the amount of \$800. The referee found as a fact, to which exception was taken, that the above mentioned conveyances by Hedges were made with the knowledge and consent of Lowry.

On the 13th day of January, 1851, by an instrument in writing, Lowry assigned the bond and mortgage to the defendant, who resided in Sinclearville. The defendant knew, at the time of his purchase, of the above mentioned conveyances, and the improvements which had been made. In the year 1853 the plaintiff Copp erected improvements on the lot bought by him, of the value of \$3000. Before and subsequent to Dewey's purchase from Lowry, there were verbal conversations between him and Hedges in which it was understood that a new mortgage should subsequently be given by Hedges, excluding from its description the parcels of land which had been sold, and that a survey should be made of the unsold lands, the new mortgage including these only. No consideration passed between Dewey and Hedges on account of this understanding, and it was never executed.

In 1856 the defendant stated to one Henry A. Kirk that

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he did not suppose, when he bought the mortgage, that he had any claim on Copp's, Crawford's and other lots sold by Hedges.

Just prior to Merchant's taking his deed from Hedges, in response to an inquiry from Merchant whether he could get from Hedges a good title to his lot, and whether Dewey had any claim upon it, Dewey stated that he held a mortgage on said lot and other lots; that the deed from Hedges would be good, for he, Dewey, would release; that he was going to release several lots, and would release this with the rest. Merchant stated, at the time, that he had paid the purchase price to Crawford. This conversation was never communicated to Copp, who remained without actual notice of the mortgage until 1856. At the time of making their improvements, the other plaintiffs were without personal information of the existence of the mortgage, and the conversations of Dewey with Hedges and Kirk were not communicated to any of the other parties. Neither Lowry nor Dewey held any intercourse with any of the purchasers plaintiffs respecting the mortgage, prior to the commencement of foreclosure proceedings. At the time of the assignment to Dewey he indorsed, on his own bond, the Crawford bond and mortgage as so much payment to him, and the latter were subsequently satisfied by Crawford.

On the 1st of February, 1853, Hedges gave the defendant four notes for the interest on the bond for the year ending January 13th, 1853, which the defendant then stated he would take as payment, and they were receipted on the bond as money. Two of them were paid. The other two, for \$65 and \$60, respectively, are unpaid. Hedges made a general assignment in 1855, and has been insolvent since. He has for some years resided in Iowa.

September 25, 1852, the defendant received Hedges' notes for the interest for the year ending January 13th, 1852. One note was for \$228.18, another was for \$1050, and included a

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balance of account due to the defendant. These notes were unpaid when due, and the latter was renewed by Hedges. Judgment was obtained against him in 1855 by the defendant, for the full amount, no part of which has been paid. These notes, when first taken, the defendant stated he would take as payment for the interest for the year ending January 13th, 1852, and the amount of such interest was receipted on the bond.

The cause was tried before a referee, who found the above facts, substantially, and as a conclusion of law, held that the defendant should be perpetually enjoined from foreclosing the said mortgage as to the lands sold to the plaintiffs Crawford, Brown, Pickard and Copp, and that the amount of the notes received for interest should be excluded from the bond.

Jas. A. Allen, for the appellant. I. 1st. The consent by Lowry to sales made by Hedges, implied nothing but consent to what Hedges had a right to do without consent. Lowry got no consideration for parting with any interest in the land, and he parted with none. Moreover, he could part with no interest without writing. (2 R. S. 316, 4th ed. §§ 6 and 8.) The purchase money was paid to Hedges. No consent of Lowry was ever made known to any of the plaintiffs. 2d. The lands of Copp, Brown and Pickard were not in fact sold by Hedges with the knowledge and consent of Lowry. These lots are not identified in the testimony of Cole. *Non constat*, that Hedges did not, prior to the sale of these, sell other lots to parties other than the plaintiffs, with the knowledge and consent of Lowry. Again; it appears from Cole's testimony that a portion of the purchase money of these other lots, not specified, which were sold with the knowledge and consent of Lowry, was applied towards extinguishing the mortgage. A computation made shows that the indorsements on the bond, of Hedges' individual note, the note of himself and brother,

and the two notes of E. F. Warren, were all the payments made on the same before the assignment thereof by Lowry. The evidence of Cole is therefore shown to be incorrect, as no purchase money of other lots went to Lowry. Again; if any other lots were sold with the knowledge and consent of Lowry, which lots, and how many of them were so sold? Were all or but part of the lots in question?

II. The parol promises made to Hedges and Merchant were void as *nudum pactum*, and within the statute of frauds. (2 R. S. 316, §§ 6, 8, 4th ed. *Hunt v. Maynard*, 6 Pick. 489. 5 id. 243.)

III. None of the matters set forth as facts by the referee in his findings, constitute an estoppel in favor of any of the plaintiffs. The following is the result of the authorities on this subject: 1st. An estoppel must be certain to every intent, and not 'to be taken by argument or inference. (Co. Litt. 352, b. 3 Hill, 221. *Heane v. Rogers*, 9 Barn. & Cress. 577.) 2d. It must consist of an act on the part of the defendant, or of a misrepresentation of an essential fact by him. It cannot grow out of a mere promise, or out of an erroneous conclusion or inference from facts. (*Brewster v. Striker*, 2 Comst. 41. *Gerrich v. Proprietors of Union Wharf*, 26 Maine Rep. 384. *Hamlin v. Hamlin*, 1 App. 141. 1 Kern. 73. *Lajoie v. Pruman*, 3 Miss. Rep. 529.) 3d. The representation must have been designed, when made by the defendant, to influence the conduct of the party to whom made. (*Welland Canal Co. v. Hathaway*, 8 Wend. 480. *Griffith v. Beecher*, 10 Barb. 432. 1 Kern. 73. *Middletown Bank v. Jerome*, 18 Conn. Rep. 443. *Kinney v. Farnsworth*, 17 id. 355. *Brown v. Wheeler*, Id. 345.) 4th. It must have been acted on by the party in whose favor it is urged, he being induced through it to enter upon a course of conduct which, but for the representation, would have been omitted. (*Lawrence v. Brown*, 1 Seld. 401. 3 Hill, 221, 2, 219. 5 Denio, 157. 6 Adol. & Ellis, 469. *Ryers v. Farwell*, 9 Barb. 618. *Heane v. Rogers*, 9 Barn. & Cress. 577. 6 Pick. 455. Mid-

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mortgage shall be notice to subsequent purchasers. It prescribes that this record shall be notice for the very purpose of affecting the purchaser with the consequences of actual notice in respect to the land purchased. To say that the law infers the existence of notice from certain facts, is to say that the law intends to infer all the consequences of the actual existence of notice. There can be no distinction drawn, in respect to these consequences, between personal notice and that notice which is given by a compliance with the statute. To attempt such a distinction, is to put a premium on negligence, and to break down and destroy the statute. (*Johnson v. Stagg*, 2 *John.* 523, 524. *Jackson v. Dubois*, 4 *id.* 220.) 4th. Good faith cannot be predicated of a party guilty of gross negligence. The plaintiffs were guilty of gross negligence in erecting their improvements without having examined the records. 5th. The same reason which compels the mortgagee to suffer the loss arising from depreciation of the property, allows him the benefit, on the other hand, of all accessions to it. This principle is founded in the broadest justice. Dewey paid the face of the mortgage to Lowry. Soon after, Hedges began the erection of valuable improvements which Dewey supposed wholly on the mortgaged premises, but which were not so. Hedges failed. The property subject to the mortgage depreciated. The plaintiffs sought to set aside the mortgage for usury. The question was decided adversely to them in 1858. Interest has been accumulating while the unsold premises have lessened in value. While equity cannot avert the decay of the premises, neither does it, on the other hand, take away from the holder of the security such compensatory accessions to the property as may come to it. *Equitas sequitur legem.*

IV. The amount of the two unpaid notes (\$65 and \$60) for interest for the year 1852 must be allowed the defendant. The receipts on the bond are nugatory when they are once explained. (8 *Wend.* 535. 5 *John.* 68.) The

law is well settled that a promissory note of the debtor for a precedent debt, without new consideration moving between the parties, cannot become a satisfaction of the debt, though agreed to be taken as such. It is but a cumulative promise founded on a liability already subsisting. (15 *John*. 247. 1 *Hill*, 516. *Hughes v. Wheeler*, 8 *Cowen*, 77. 21 *Wend*. 452, and cases cited. 5 *Hill*, 449.) It was not necessary for the defendant to produce the notes on the trial, as the obligor was not a party to the action, the same being brought by the plaintiffs for the purpose of ascertaining the true amount due on the bond. The notes were at the time outlawed. Hedges was insolvent and a non-resident. To have canceled the notes would have been an idle proceeding.

VII. The same proposition is true in respect to the notes for interest for the year 1851. One of the notes (\$228.18) went directly into the judgment. The other note, for \$1050, was taken up by Dewey, and new notes given therefor by Hedges, on which last judgment was rendered. The number of renewals is immaterial; they were still the debtor's own notes, and not payment of the debt on bond. Neither did the judgment extinguish the bond debt. (2 *Hill*, 339. 11 *John*. 513.) The notes were collateral to the bond, and the judgment was no higher security than the specialty. The nature of the action obviates any objection relating to the section of the Revised Statutes (2 *R. S.* 256, § 64) respecting bills for foreclosure. This section, if not repealed by the Code, has no application to a case in which the parties to be charged are plaintiffs. Themselves seeking equity, they must submit to the plenary exercise of the court's equity powers. (1 *Barb*. 362. 7 *Paige*, 451. 11 *id.* 386. 1 *Story's Eq. Jur.* §§ 64 to 66, 71. 2 *John. Cas.* 424. 10 *id.* 587, 596. 17 *John*. 384. 1 *John. Cas.* 414.)

VIII. It is not claimed that the land of Crawford is liable beyond the \$200 paid to Hedges. The sum of

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\$675 applied on the Lowry mortgage exonerates the land *pro tanto*.

IX. It cannot be necessary that the parties should be burdened with a new trial in this case. The court should modify the judgment, by directing a sale of the whole premises, subject to the mortgage, in their proper order.

Hazeltine & Clark, for the respondents.

By the Court, GROVER, J. The determination of this case will be facilitated by considering the rights of the purchasers from Hedges collectively, in the first instance. These purchases were made while the defendant's mortgage was owned and held by Lowry. It is necessary first to ascertain whether the purchasers have shown a right to have their lands respectively discharged from the lien of the mortgage at the time of its transfer from Lowry to the defendant. If they had such right against Lowry, at the time, it is equally available against the defendant as assignee of Lowry. He took the mortgage subject to all defenses that existed against it in his hands. It must be borne in mind that it is against the defendant that it must be shown that the purchasers had a defense to the mortgage while owned by Lowry, and at the time he transferred the same to the defendant. This renders the admissions of the defendant competent evidence of any facts tending to establish such defense. The referee finds that the sales were made by Hedges to the respective purchasers, and the considerations therefor received by Hedges with the knowledge and consent of Lowry while the owner of the mortgage. Whether the referee based his judgment upon this fact, or upon the other facts found by him, does not distinctly appear; nor is it material, if this or any other facts found by the referee will warrant the judgment rendered. The referee also finds that Lowry did not consider the mortgage a lien upon the respective parcels so

sold by Hedges. There is no dispute that those parcels are covered by the mortgage, and that they were originally subject thereto, and of course they so continued, unless by some act of Lowry they were discharged. Whether Lowry considered them subject to the lien is wholly immaterial, except so far as it may be evidence of some agreement, act, or omission on the part of Lowry, discharging the lien. Hedges, as mortgagor, had the right to sell the lands in such parcels as he chose; and knowledge by Lowry that he was making such sales, and receiving the consideration therefor, would not discharge the lands sold from the mortgage. When Lowry had carried his mortgage to be recorded he had done all that was required of him to preserve his lien; and all persons purchasing from Hedges subsequent thereto, were bound at their peril to investigate the title and take notice of the mortgage. If they neglected this, it was their own fault, and neither law nor equity can relieve them from the consequences of the omission. This rule must be strictly adhered to, or incumbrances upon real estate will no longer constitute safe investments. I confine these remarks alone to the fact that the sales were made with the *knowledge* of Lowry. It is also found that they were made, and the consideration received therefor, by Hedges with his *consent*. By this finding I apprehend that something more was intended by the referee than the mere non-action of Lowry to prevent the sales. He could do nothing to prevent the sales, other than to proceed to foreclose the mortgage if there was any thing due thereon. This he was not bound to do. He had a right to presume that the purchasers had examined the records and knew of his mortgage, and that they were satisfied with the covenants of Hedges, as to title, and with their equitable right to have the lands embraced in the mortgage remaining unsold first applied to the satisfaction of the mortgage, or had obtained other security against the lien. The referee

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probably intended, by the finding, that Lowry had entered into some agreement respecting his lien, whereby the lands purchased were discharged from the lien. He does not find what this agreement, if any, was. This renders it necessary to look into the evidence to ascertain whether Lowry had made any, and if so, what agreement respecting it. This evidence consists mainly of the declarations of the defendant. It is shown that the defendant said he did not suppose his mortgage was a lien upon lots sold by Hedges, when he purchased the mortgage. This declaration is of no consequence except as evidence tending to show an agreement or act of Lowry discharging the mortgage. That he told Merchant that he would release the parcel contracted by Hedges to Crawford, whose interest Merchant had acquired. That Hedges' deed for said parcel would be good, and that he was going to release several lots, and would have it all done at once. The declaration that he was going to release several lots is only evidence from which it may be inferred that Lowry or the defendant had agreed to release the lots in question, provided such inference is warranted by the other evidence in the case. Standing alone it amounts to little or nothing, so far as the plaintiffs, other than Copp, who has succeeded to Merchant's title, are concerned, being equally consistent with the idea that the defendant considered the unsold land sufficient security, and therefore was willing voluntarily to discharge these parcels from the lien. It was further proved that the defendant told Cole that the description of the mortgage embraced lots in the possession of others. That Hedges had sold these lots by an arrangement and with the consent of Lowry, when Lowry owned the mortgage. This evidence is not more certain than the referee's finding. It does not show with whom an agreement by Lowry was made to discharge any land from the lien, nor upon what consideration or conditions such release was to be given. The purchasers were witnesses

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in the case, and they none of them claim to have made any agreement, themselves, with Lowry. On the contrary, they testify that they knew nothing of the mortgage. Hedges is a witness for the plaintiffs, (and from his deposition there is no reason to believe an unwilling one,) and he is silent as to any agreement made between himself and Lowry, or any release. He testifies that he was present at the purchase of the mortgage by the defendant of Lowry, and yet not one word do we hear of having been said about any release of lots sold by Hedges. That he did not wish him to consider the lands sold any part of the security if he purchased the bond and mortgage. That the defendant told him he considered the unsold land amply sufficient to secure the amount due on the bond and mortgage. This is utterly inconsistent with the idea that Lowry had discharged the lots in question by an agreement with Hedges. I think the evidence fails to show the release of any of the lots by Lowry while the owner of the mortgage, or any act affecting the lien upon any parcel except the one conveyed to Crawford. It follows, then, that at the time of the transfer of the mortgage by Lowry to the defendant, it was a lien upon all the lands sold by Hedges, except the parcel sold to Crawford. We must then examine and see whether the defendant has released any of the lands, or has estopped himself from asserting a lien thereon by his acts and declarations.

No release by him to any of the plaintiffs is claimed. Hedges testifies that the defendant was informed of the lots sold by him, at the time he purchased the mortgage. This is clearly immaterial. By the purchase he acquired Lowry's rights, and we have seen that knowledge by Lowry of the sales made by Hedges would not estop him, and of course it would not estop the defendant. Hedges also testifies that he made an arrangement with the defendant by which he was to execute a new bond and mort-

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gage to him, leaving out the parcels sold. The defendant does not in his testimony deny this. It does not appear that there was any consideration for this. Indeed it appears that there was not. This, then, so far as Hedges and the defendant are concerned, is a mere verbal contract in regard to an interest in real estate, based upon no consideration, and in no part performed. It requires no argument to show that such a contract is wholly nugatory, so far as the parties thereto are concerned. This arrangement does not appear to have been even communicated to the plaintiffs, and I do not see how, if it had been, it could avail them, unless it was shown that they proceeded to invest their means upon the expectation of its performance, to the knowledge of the defendant. In that event, silence on his part, while the plaintiffs or either of them were expending their money, would have been fraudulent. This arrangement between Hedges and the defendant cannot aid the plaintiffs. The defendant's knowledge that some of the plaintiffs were making improvements upon the lots conveyed to them by Hedges does not estop the defendant. As remarked above in regard to Lowry, the defendant had a right to presume that the plaintiffs had examined the records and knew of the mortgage, and had obtained security satisfactory to themselves against the lien. Any other rule would wholly fritter away the recording acts. No case can be found holding that a mortgagee whose mortgage was duly recorded, lost any right by neglecting to give personal notice of his mortgage, to a purchaser from the mortgagor. This is not at all analogous to the class of cases where one having the title to land himself knows that another, ignorant thereof but believing himself to be the owner, is proceeding to erect improvements thereon, and the real owner conceals his title from him, or remains silent in relation thereto. An *estoppel en pais* arises when a party has made representations, or done acts, to influence the conduct of an-

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other by inducing a belief of a given state of facts when such party, having acted upon such belief, would be injured by showing a different state of facts. (*The Welland Canal Company v. Hathaway*, 8 Wend. 480. *Ryeres v. Farwell*, 9 Barb. 618.) Testing the acts of the defendant by this rule, the evidence comes short of showing any estoppel against him, except as to the land conveyed to Merchant, which will be noticed hereafter. The defendant concedes that the land sold by Hedges to Crawford is only liable for the balance of the purchase price, after deducting the amount of the mortgage thereon, transferred to Lowry and by him to the defendant, and by the latter indorsed upon the mortgage in question. Under the facts of this case I think this parcel liable for such balance, with interest thereon. There is no evidence of any agreement by the holders of the mortgage, in relation to this parcel, except what is to be inferred from the receipt of the mortgage by Lowry. Upon a sale by the mortgagor, equity exonerates the land sold from the lien of the mortgage to the extent only that the purchase money has been applied upon the mortgage. It is unnecessary to discuss at any length the equity of Copp in the parcel conveyed to Merchant growing out of the facts testified to by Merchant, as the referee has not passed upon these facts. The case shows that evidence was given tending to impeach Merchant and to sustain him, and how the referee would have determined does not appear. I will add that if upon another trial facts should appear estopping the defendant as to this or any other particular parcel, the defendant, so far as lands conveyed by Hedges, prior to the creation of such estoppel, are concerned, must be charged with the value of the lands at the time he so estopped himself from asserting the lien. The plaintiffs claim that in case lands sold and conveyed by Hedges are charged with the mortgage, they are only to be charged

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with their value exclusive of improvements made by the purchaser.

No such rule has ever been applied between mortgagees and purchasers from the mortgagors, in this State. The reverse is the law. I regret that in this case the operation of the rule may be somewhat harsh upon some of the plaintiffs; but the court has no more power to change or modify the established rules in equity than in cases of legal cognizance. Improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of a mortgage as the land upon which they are made.

The only remaining question is as to the amount due upon the mortgage. The dispute upon this point arises upon the notes of Hedges received by the defendant on account of interest due upon the bond. The referee has found that the notes were agreed to be taken as payment, by the defendant. It is well settled that a new promise to pay is no defense to an action brought upon the original obligation, although expressly agreed to be taken as payment, (*Waydell v. Luer*, 5 Hill, 448, and cases cited,) the reason being that there is no consideration for the promise to receive the new promise in payment. When this reason does not apply, the rule no longer prevails. If any new or additional security or other benefit is obtained by the plaintiff, or any detriment sustained by the defendant, by the new agreement, the defense is perfect. Apply the rule to this case. The notes were given for interest due. This interest, by the well settled rules of law, did not draw interest. The notes were given upon interest. Thus a demand not drawing interest was converted into a debt on interest. This was a benefit to the defendant, and the very benefit, as the case shows, the defendant was seeking. I think this is a good consideration for the agreement of the defendant to accept the notes in payment. This would not apply to a debt already

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upon interest. It follows that the referee did not err in holding that the notes, although not in fact paid, operated as a defense to that portion of the defendant's claim. It is not an answer that the defendant was presently entitled to receive the money, and that its present receipt would have been equally beneficial to the defendant as notes upon interest. This might or might not have been so.

In the above remarks I must not be understood as expressing any opinion upon the controverted question of fact, whether the defendant expressly agreed to receive the notes in payment. This must be determined from the proof. The defendant's counsel insists that instead of ordering a new trial, the court shall modify the judgment. This we cannot do. The case contains only the exceptions on the part of the defendant. To modify the judgment prejudicial to the plaintiffs without giving them a new trial would be error. This has repeatedly been so held by the Court of Appeals.

The rule as to the order of sale is so well settled that I shall not discuss it.

There must be a new trial; costs to be determined by the final judgment.

[ERIE GENERAL TERM, February 10, 1862. *Marvin, Davis and Grover, Justices.*]

MEAD and others vs. SHEPARD and others.

A referee found, as matter of fact, that the defendants were partners in the business of purchasing land in the counties of Wayne and Seneca, and the cutting and sale of wood thereon, from the 24th of January, 1865, until after the 16th of September, of the same year; and that as such partners they cut, or caused to be cut, wood and logs on two lots, and were engaged in the construction of a saw-mill upon one of the lots. *Held*, that upon these facts the referee was warranted in the conclusion of law that the defendants were liable for supplies furnished to, and labor done for, them in carrying on the said business.

The defendants, H. S., C. S., N. and A., by their agreement in writing, dated January 24, 1865, became jointly interested in an adventure for the purchase of lands in the counties of Seneca and Wayne, and for the cutting and sale of the wood thereon, on their joint account. H. S. was to be the acting agent of the parties, in the purchase of the lands and in carrying on the business of cutting and selling the wood thereon, and C. S. was to be the trustee for his associates, to receive the title to the lands and to hold possession of all papers and vouchers connected with the said purchases, and with the sales of such land, and to keep and deposit all moneys received or realized, for the use and benefit of the said parties. Under this agreement H. S. opened, and for several months kept open, an office for the purchase of land and the cutting and sale of wood and timber. During this period he purchased various parcels of land, for which he took contracts, or deeds, in his own name. Most of the contracts were afterwards assigned to C. S. The money for the purchase of these lands, and for the carrying on of said business, was paid chiefly by C. S., all of the defendants paying more or less thereof, except H. S., who was not to contribute any thing to the original purchase of the lands, but was afterwards to contribute towards the expenses in proportion to his interest. Among other lands purchased by H. C. were two lots called the S. lot and the A. lot. The principal work done by H. C. and by others under his direction, while managing the business, was on those lots; and all the wood cut and timber got out by the men employed by him was on these two lots.

Held, that in contracting for the purchase of the S. and A. lots, and in cutting the wood and timber thereon, H. C. was performing the duty assigned to him by his associates, for which he opened and kept open said office; and the wood and timber cut on those lots having been so cut for the common benefit of all the defendants, they were responsible for all his contracts with the men hired to labor thereon, and for supplies furnished him to enable him to prosecute such business.

Held, also, that upon the above facts being proved, in an action brought by parties who had performed labor and furnished supplies for the benefit of those jointly interested in the said land, against the latter, to recover the

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amount thereof, a report of a referee in favor of the plaintiffs, against all the defendants, not only could not be set aside as being against the evidence, but was clearly right, and in accordance with the fair and just weight of the evidence.

APPPEAL by the defendants from a judgment entered upon the report of a referee.

The action was brought by the plaintiffs as copartners in business under the firm name of Lewis C. Mead & Co., against the defendants and one Henry C. Spaulding as partners in business under the firm name and style of Henry C. Spaulding & Co., to recover for goods sold by them to said Spaulding & Co., and for demands for labor, assigned to them by others.

The defendants Shepard and Nichols answered by general denial; the defendant Archer, not having been served with process, did not appear. The cause was referred to a referee.

On the trial the questions litigated were, 1st. The partnership of the defendants. 2d. The liability of the defendants for the alleged demands, even if partners. 3d. The right of the plaintiffs, as partners, to recover the claims alleged to have been assigned to them.

It was proved that on the 24th of January, 1865, the defendants entered into an agreement to procure the purchase of two thousand acres of wood land, in the counties of Wayne and Seneca. The contracts were to be made therefor by Henry C. Spaulding, and assigned to Charles J. Shepard, as trustee, for the benefit of the parties. It was agreed that if any personal bond was required, Spaulding was to give it. Shepard was to pay \$4000; Nichols, \$3000; Archer, \$1000. Their respective interests were as follows: Spaulding one-half interest; Shepard one-fourth interest; Nichols three-eighths of one-half interest; Archer one-eighth of one-half interest. Spaulding was not to pay any part of the first \$8000, but was afterwards to contribute towards any expenses, in proportion to their

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respective interests. The title to said two thousand acres to be perfected in Shepard, on or before the 1st day of March, 1866. It was also provided as follows: "It is hereby declared to be the duty of the said trustee, Charles J. Shepard, on the completion of the purchase and the vesting the title in him, or as much sooner as the same may, by agreement or otherwise, be lawful and permissible, to proceed to make arrangements for the cutting and sale of the wood on said premises, either personally or through such agency as he may select, and from the proceeds thereof shall pay off any indebtedness incurred in the prosecution of any work."

Under this agreement Spaulding proceeded to purchase lands, and an office was opened at Savannah, Wayne county, on the 2d day of February, 1865. Mason Loomis was their book-keeper; the books were kept by him in the name of Charles J. Shepard, trustee. The business of the company was the purchasing of woodlands, getting out wood, sawing logs and selling timber. Spaulding was the directing man of the company. The book-keeper, Mason Loomis, testified that he understood the parties indebted to be Spaulding, Shepard, Nichols and Archer, and that he received his pay by checks drawn by Spaulding on Shepard. The sources of his information were declarations of Spaulding, letters written by Nichols to Spaulding, letters from Shepard to Spaulding, and books, letters and checks. There was no wood or timber got out on any other lot except the Smith and Armitage lots. The plaintiffs furnished groceries to the men working upon the Armitage and Smith lots, at the request of Spaulding, charging them to Spaulding & Co., by his directions. And sundry claims of laborers, for work done for the defendants, upon the lands in question, were assigned to the plaintiffs, for which the latter claimed to recover.

The referee found the facts as they are stated in the opinion; and he found as a conclusion of law, that the

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plaintiffs were entitled to recover of the defendants the sum of \$871.17 for the items furnished by them to the defendants, and the further sum of \$333.67 for the items of account assigned to them by the persons named, together amounting to \$1204.84, and interest; and he ordered judgment in favor of the plaintiffs, against the defendants, for the sum of \$1285.66, with costs.

Sedgwick, Andrews & Kennedy, for the appellants.

Hunt & Green, for the respondents.

By the Court, E. DARWIN SMITH, J. The referee finds, as matter of fact, that the defendants were partners in the business of purchasing land in the counties of Wayne and Seneca, and the cutting and sale of wood thereon, from the 24th day of January, 1865, until after the 16th day of September of the same year; and that as such partners they cut, or caused to be cut, wood and logs on a tract of land known as the Armitage lot, and also on a tract of land known as the Smith lot, and were engaged in the construction of a saw-mill on said Smith lot. The whole case depends upon this finding; for there is no question, or room to doubt, that the judgment is right if this finding upon the fact is warranted by the evidence. The legal conclusions drawn by the referee are clearly correct upon the premises assumed by him. We are therefore asked, in reviewing this judgment, to set the same aside on the ground that the report of the referee upon the facts upon which it is founded is without evidence, or against the clear and decided weight of the evidence. Upon the clear and undisputed evidence in the case, aside from some evidence which perhaps was erroneously received against the objections of the defendants' counsel, it seems to me that the report of the referee not only cannot be set aside as against the evidence, but is clearly right and in full accord-

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ance with the fair and just weight of the evidence. The defendants, by their agreement in writing of the date of January 24, 1865, became jointly interested in an adventure for the purchase of lands in the counties of Seneca and Wayne, and for the cutting and sale of the wood thereon, on their joint account. The defendant Spaulding was to be the acting agent of the parties in the purchase of the said lands and in carrying on the business of cutting and selling the wood thereon, and the defendant Shepard was to be the party or trustee for his associates to receive the title to the lands purchased and to hold possession of all papers and vouchers connected with the said purchases, and with the sales thereof, and to keep and deposit all money received or realized, for the use and benefit of the said parties. Under and in pursuance of this agreement it clearly appears, and is undisputed and indisputable, that the said defendant Spaulding proceeded from Brooklyn, where these parties then resided, to Savannah in the county of Wayne, where he opened, and kept open, for six months or so, an office for the purchase of land and the cutting and sale of the wood or timber growing thereon. That during this period he purchased a large number of strips or parcels of land, for which he took contracts in his own name, or deeds. That most of these contracts were afterwards assigned to Shepard. That the money for the purchase of these lands and for the carrying on of the said business was paid chiefly by the said Shepard, all of said defendants paying more or less thereof, except the defendant Spaulding, who was not to contribute any thing to the original purchase of said lands, but was afterwards to contribute towards the expenses in proportion to his interest.

Among other lands purchased by said Spaulding after he opened such office, February 2d, 1865, and while he kept up the said business, which ended in September afterwards, were the two lots called the Smith lot and the Armitage lot. The principal work done during this period by the

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defendant Spaulding, and under his direction, was on the said Armitage and Smith lots, and all the wood cut and timber got out by the large number of men employed by him was on these two lots. In contracting for the purchase of these two lots, and in cutting the wood and timber thereon, Spaulding was performing the duty assigned to him by his associates, the other defendants, and for which he went to Savannah and opened and kept open said office. The wood and timber cut on these lots was so cut for the common benefit of these defendants. It matters not that the contract for the purchase of these lots was given up, or that the defendants failed or refused to complete the purchase thereof by paying up the purchase price in full. While Spaulding held possession of said lots and was carrying on the defendants' business entrusted to him, they were, and must be, responsible for all his contracts with the men hired to do such work thereon, and for supplies furnished him to enable him to prosecute such business. Such work was done and such supplies furnished for the common use and benefit of all the defendants. I can see no ground in the evidence for the pretense that the said Smith lot and the Armitage lot were not purchased on the joint account and for the common benefit of the defendants. The Smith lot was purchased on the 11th of April, 1865. Of the \$2000 of purchase money paid in hand upon it, \$1500, it appears, was paid by the defendant Shepard, and \$500 by the defendant Nichols, upon his note or check. There is no evidence in the case which tends to discriminate between the purchase of the Smith and Armitage lots and the other lots, or to show that the work done on these was for the private benefit and account of the defendant Spaulding, except his deposition, which is shuffling and evasive and not entitled, I think, to credit in view of his whole conduct, acts and declarations, as disclosed by the clear and undisputed testimony in the case. At least, the referee had a right to

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disbelieve him. Some of the questions put to the witness, I think, were objectionable; but rejecting all the evidence called for or received, which might possibly be regarded as inadmissible upon objections properly taken thereto, there is abundance of testimony besides, properly received and clearly admissible, to sustain the referee's report, and I do not think any possible injury has been or could be done by the answers to the questions so objected to. I think the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 2, 1867. *J. O. Smith, Waller and E. D. Smith, Justices.*]

THE PEOPLE, *ex rel.* The Board of Education of Saratoga Springs, vs. WILLIAM BENNETT, DANIEL O'GORMAN and HIRAM TEFT, Trustees of the village of Saratoga Springs.

Where the board of trustees of an incorporated village consisted of six members, three of whom voted to raise by tax a sum of money required by statute to be raised, and three voted against the raising of the same; *Held* that this act of the board was, in legal effect, a refusal to raise the required sum, for the reason that a majority did not vote in favor of the requisition.

Neither the officers created by the act of April 12, 1867, "to consolidate the several school districts and parts of districts within the corporate limits of the village of Saratoga Springs, and to establish a free union school or schools therein," (*Laws of 1867, ch. 858*), nor the trustees of school districts within that village, are *county, city, town or village* officers, within the meaning of the first and second branches of section 2 of article 10 of the State constitution.

The third branch of section 2 of said 10th article of the constitution embraces, in its scope and language, not only trustees of school districts, but also all officers whose offices might be thereafter created; such as boards of education, and the like.

Hence, whether the officers named in the act of April, 1867, are called school trustees, or members of "the board of education," or by any other name, title or character of school officers, and though possessing by their creation

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substantially the same powers, and exercising or attempting to exercise, the functions or duties of school trustees, the legislature did not transcend its legitimate powers by the enactment of the said act, and in the creation of a board of education consisting of the persons named, with the powers therein conferred.

Whether the board of education thus created possesses more or less powers than ordinary school district trustees, they are clearly brought within the third branch of section 2, article 10 of the constitution, as officers "whose offices may hereafter be created by law," and may therefore be appointed by the legislature.

The act of April 12, 1867, is not unconstitutional and void as being in violation of section 16, article 8 of the State constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Although the act in question is *local*, being confined to a particular locality, yet it embraces but one *subject*, viz., the establishment of a free union school or schools, within the limits specified.

Where trustees of a village, who were required by a statute to raise and collect by tax, in the same manner as other taxes are collected, such sums as a board of education created by such statute should deem needful in order to organize and carry on the schools within the limits of said village, on being duly notified by such board of its determination as to the sum needed for the purposes expressed in the act, refused to raise the same by tax; *Held* that they could be compelled, by *mandamus*, to do so.

MOTION for a mandamus to compel the defendants to raise money by tax.

C. S. Lester, for the relators.

W. A. Beach, for the defendants.

POTTER, J. This is an application by the relators, claiming to be a body corporate, created by statute, (*Chap. 353 of the Laws of 1867*,) and that they are thereby invested with certain powers, for educational purposes, within the limits of the village of Saratoga Springs, for a mandamus against the defendants, who are trustees of said village, and who, as such trustees, are, by the terms of the 17th section of the same act, directed and empowered, and it is also therein expressed to be their duty, to raise and collect,

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by tax, in the same manner as other taxes are collected, such sums as the said "board of education" shall deem needful in order to organize and carry on the schools within the district, composed of the territory within the corporate limits of said village. The relators have made the required certificate, and notified the defendants of the amount needed for the purposes expressed in said act, to wit, the sum of \$6000. The defendants, after such certificate and notice, at a meeting of their board held on the 15th day of June, 1867, and after taking into consideration the said action of the relators, refused to raise the said sum according to such requirements. They placed their refusal on the ground that the act in question is unconstitutional, and gave notice of their said action to the relators.

As the mandamus applied for is to compel the defendants to raise the said sum of money under and by virtue of the provisions of the act referred to, it will be our first duty to examine the question so raised between the parties. It may be proper to state, that it appears from the papers before me, that "the board of trustees of said village" consists of six members, three of whom voted to raise the required sum, and the three defendants named in the papers voted against the raising of the same. Such act of that board is, in legal effect, a refusal to raise the said sum, for the reason that a majority did not vote in favor of the requisition.

The defendants claim that the relators show no legal right under this act of the legislature, so far as it constitutes them "the board of education of the union free school of the village of Saratoga Springs," to make such a requisition, inasmuch as the said act is unconstitutional and void; that therefore the relators show no title to their office, or right to require the defendants to raise the said sum of money. The principal or material ground of this objection is, that the legislature have assumed to appoint as

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officers, the members of the board of education, in contravention of article X, section 2 of the constitution of this State, which is as follows: "All *county* officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors, or other county authorities as the legislature shall direct. All *city, town and village* officers, whose election is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All *other officers*, whose election or appointment is not provided for by this constitution, and *all officers whose office may hereafter be created by law*, shall be elected by the people, or appointed as the legislature may direct." We are to presume that the framers of this constitution, when they spoke of *county, city, town and village* officers, spoke of them as such officers were then known and distinguished by existing laws; and statutes were then in existence, in which county, city, town and village officers were designated and particularly enumerated by their names of office.

By article 1, section 17, of this same constitution, it was declared "that all the acts of the legislature then in force, and not repugnant to that constitution, should continue to be the law of the State, subject to such alterations as the legislature might make concerning the same." At that time, there was a statute of this State directing the manner of electing county officers, which was thus preserved in force; but as the officers in question are not claimed to be *county* officers, there is nothing in the first branch of the section 2, article 10 of the constitution, above cited, applying to the officers in question. We therefore give that branch no further consideration. The second branch of this second section of article 10 is made applicable to *city, town and village* officers. The election

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of these, except justices of the peace, is not in terms provided for in the constitution. They are therefore to be elected by the electors of such city, town or village, or by the electors of some division of such city, town or village; or, are to be appointed by such authorities as the legislature shall designate for that purpose. Excluding *city* officers as inapplicable, we may inquire, are the relators *town* or *village* officers? They certainly do not come within the enumeration of town officers, as declared in 1 *Revised Statutes*, 340, § 3; 5th ed. 815, who are therein specified to be, supervisor, town clerk, assessors, collector, overseers of the poor, commissioners of highways, superintendent of common schools, constables, town sealer of weights and measures, overseers of highways, and pound masters. Neither by this enumeration, or otherwise, are the newly constituted board of education town officers; nor can they, appropriately, be called such, as we may judicially notice that this village is but a part of the town. As inappropriately could trustees of school districts, who were such before the passage of the act in question, be called town officers. School districts are not limited by town lines; they are often composed of territory in adjoining towns, and they are not elected at town meetings. They are not properly *village* officers. At the time the constitution was adopted, the special charter of each village contained an enumeration of its proper officers; and the first *general* law for the incorporation of villages was subsequently passed in 1847. (*Laws of 1847, ch. 426.*) This act enumerates the list of *village officers*, (§ 25,) as follows: Five trustees, three assessors, one collector, one treasurer, one clerk, street commissioners and fire wardens. (Trustees of school districts are not mentioned.) No others are known as village officers, under the *general* law, than those specified. The act we are considering has not named or constituted them town or village officers, nor does the charter of the village of Saratoga Springs,

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(*Laws of 1866, chap. 220,*) which enumerates the *village officers* thereof, (§ 4,) name trustees of school districts as village officers.

It is perfectly clear then, that neither the officers created by the act of 1867, (*Laws of 1867, chap. 353,*) nor the trustees of school districts within the corporate limits of the village of Saratoga Springs, are, by any known enumeration of officers, *county, city, town or village officers*, within the meaning of the first and second branches of section 2, of article 10 of the constitution, referred to.

The third branch of section 2 of said article seems to have been made and intended for just such a case; and it clearly embraces in its scope of language, not only trustees of school districts, but also all officers whose offices might be thereafter created; such as boards of education, and the like; so that, whether the relators are called school trustees, or members of "the board of education," or by any other name, title or character of school officers, and though possessing by their creation substantially the same powers, and exercising, or attempting to exercise, the functions or duties of school trustees, there can exist no reasonable doubt that, as against this objection, the legislature have not transcended their legitimate powers, by the enactment in question, and in the creation of the relators as a board of education, with the powers therein conferred. "Whether this board, as created, possesses more or less powers than ordinary school district trustees, they are clearly brought within the third branch of section 2, article 10 of the constitution, as officers "whose offices may hereafter be created by law," and may therefore be appointed by the legislature.

It is also claimed by the defendants, that this act is unconstitutional and void, as being in violation of section 16, article 3 of the constitution, which is in the following words: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and

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that shall be expressed in the title." If this objection is sound, and true, and has application to the act in question, the defendants are not bound to obey the mandate of this enactment.

I think it may be conceded that the act in question is local, according to the general understanding of that term; it is confined to the locality of Saratoga Springs. The only question then, under this objection, is, does it in fact embrace more than one subject? The title of the act is, "An act to consolidate the several school districts and parts of districts within the corporate limits of Saratoga Springs, and to establish a free union school or schools therein."

What then was the "*subject*" about which the enactment was made? The subject was, "*the establishment of a free union school or schools within the corporate limits of Saratoga Springs.*" If the title of the act had been in the words we have italicized, only, could there have been any doubt that the legislature had power to make all needful and incidental provisions to perfect the objects or *subject* of that act? This necessity might call for the consolidation of the several school districts within that territory, and if so, it could have been done, within the power of the legislature, without expressing it in the title of the act, as they have done. It does no harm in the title, but it is surplusage and needless, even there. This *consolidation* of districts relates to the subject of a free school or schools within that village, and is a convenient part of the necessary machinery to perfect that object, or, "*the subject.*" It is insisted that this act confers upon the board of education the power to order the trustees of the village to raise money, and to tax the citizens for all needful means to organize and carry on such school or schools, in the same manner as other taxes are collected; and that this subject of taxation is not expressed in the title of the act. Is not the raising of money to support and maintain this school

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or schools a necessary part of the establishment of the school? Can it be established without means? Is any body taken by surprise because a provision to support the school was inserted in the act? Is a provision that is a necessary part of the *same* subject, to be called *another* and a *different* subject? Did the framers of the constitution intend that every separate provision of every law upon one subject, or having one object, should be expressed in its title? We must not charge them with such absurdities. This constitutional provision was for a practical and sensible purpose. Had this act contained a provision incorporating the mineral springs of said village, or other subject foreign to schools, it would have been obnoxious to the charge of embracing more than one subject. This suggestion illustrates the meaning of the provision. Such an incorporation would have been a violation of this constitutional provision. The object and meaning of the provision is plain; the provision itself is wise, but I am unable, however, to discover in this act any infraction of the last cited constitutional guard. The act and its various provisions all seem to relate to one object. They all seem to relate to the subject of the bill in question, and to be necessary incidents and appropriate provisions of the law, to organize and carry on the school.

The legislative power of the State, when free from constitutional restrictions, is the supreme power in the enactment of laws. All the citizens of the State owe obedience to its authority, and it is their duty to yield that obedience when laws have been passed with the usual solemnities, except in cases where their nullity and invalidity are beyond reasonable doubt. It is one of the lamentable dispositions of the age, to refuse to obey legislative enactments that conflict with the interests or prejudices of individuals, until the question of their validity has first been passed upon by, and through, the whole series of courts, to the last extreme; and laws intended for the

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promotion of the morals, or for the education and improvement of the masses, are not only not an exception to this sentiment of hostility, but seem to excite the more bitter feelings of opposition than others; and while it is the conceded right of individuals to resist the operation of unjust and unconstitutional laws which affect their property or their rights, and to seek the aid of judicial power to pronounce such laws void, as to them, they should also bear in mind that it is a delicate duty for the judicial branch of the government to come in conflict with, and to nullify and overthrow, the authority and acts of the legislative branch. Such acts on the part of the courts are looked upon with great jealousy, as assuming arbitrary power. A distinguished judge of Massachusetts, the late Chief Justice Shaw, well remarked, that "courts of justice, when called upon to pronounce the invalidity of an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, will approach the question with great caution, examine it in every possible aspect, and ponder on it as long as deliberation and patient attention can throw any light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." (16 *Pick.* 95.)

I have given this cautious examination and thought to the statute in question, and am entirely clear in the opinion that the objections raised by the defendants are not sound, or well taken. This, probably, comprises the whole duty required of me, upon the case as presented; and here I might properly stop. But I feel disposed to add, that performing this duty I have been equally cautious not to allow my individual opinions, as to the benign and wholesome objects of the acts in question, to have any influence in the decision. The hostility to the act in question is doubtless based upon a present belief, by its opponents, that the execution of its provisions will be oppressive in

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the increased taxation it will occasion. All experience has taught to the contrary of this view. The expenses of criminal police will probably be diminished in a greater proportion than the expense of education is increased.

"Better build school rooms for the boys,
Than jails and prisons for the men,"

is a sentiment which, if not very poetic, contains a practical lesson of experience.

The defendants, in their opposition, claim to act officially as trustees of the village of Saratoga Springs. The result would be, treating them as such officials, that which way soever this motion is decided, the village corporation or the people of the village would ultimately be made liable to pay the costs. Both parties seem to be litigating at the public expense. The writ of mandamus applied for by the relators is certainly a high prerogative writ of extraordinary power, and which courts are reluctant to put in exercise, except when no other adequate remedy is provided by law; but in a proper case, when the public interests demand its use to compel the performance of duty by public officers, the courts, in the discharge of a proper judicial discretion, will direct it to issue. This seems to me to be such a case. The writ may issue.

I am unable to see in this case such a reasonable cause for the action of the three defendants named, in setting up an opposition to this plain act of the legislature, as to justify me in awarding costs against the village for their refusal to obey an act of the legislature. I think justice will be better promoted by ordering the defendants, Bennett, O'Gorman and Teft, to pay the costs of this motion, personally. Let such be the order.

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The question of probable cause, in actions for false imprisonment, has been settled as an important one, by the common law, from time immemorial. The absence of probable cause was always alleged, in the declaration, and was a necessary allegation. *Per* PORTER, J.

An important distinction is recognized, in this class of cases, both in the English courts and in our own, viz., the distinction between an arrest made by, or at the instance of, a private person, and one made by magistrates or other police or public officers, where the defense pleaded is, probable cause for the arrest.

If an innocent person is arrested upon suspicion, by a private individual, such individual is excused, if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest, without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on.

Provost marshals appointed under the act of congress of March 8, 1868, and their deputies, are such officers as by law possess the power to arrest an individual, where there is probable cause for believing that he is a deserter.

A provost marshal is a public officer; his duties concern the public, and are connected with the administration and execution of justice; and his office bears the same relation, in some respects, to the military courts, that sheriffs, marshals, constables and peace officers do to the civil courts. His acts, performed by authority of law, are done by "due process of law," within the meaning of the 5th article of the amendments to the constitution of the United States.

There can be no difference in the powers of the same character of officers, whether performing their duties under the general, or the state, governments. The common law prevails in both.

What circumstances were held, in this case, to amount to probable cause for arresting the plaintiff as a deserter.

In an action for false imprisonment, the question whether the defendant had probable cause for the arrest, upon undisputed facts, is a question for the court, not for the jury. If the facts are in conflict, the jury must find the facts, and when found, it is a question of law whether they amount to probable cause.

In trying the legality of acts done by provost marshals and their deputies, in the exercise of their duty, great latitude should be allowed; a public duty being imposed upon them, for public purposes, and they being punishable for a neglect of duty, if they fail to act, in a case where there is sufficient or probable cause for acting.

The 7th section of the act of congress of March 8, 1868, (*Laws of the United States*, 1868, chap. 75,) which provides "that it shall be the duty of the provost marshals to arrest all deserters * * * wherever they may be found,

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and to send them to the nearest military commander or military post," is, like all other statutes, to be reasonably construed; and it being entirely silent as to the time within which the deserter shall be sent to the military post, the officer is bound to send him within some reasonable period.

What is a reasonable period is generally a question of fact, dependent upon the exigencies of the case.

It is not settled as a question of law, that, without reference to the pressing duties, and the demands upon the time, of public officers, and their necessary attention to other business of the public, four days is such an unreasonable detention as to make the officer guilty of violating the language of a statute specifying no time, and render him liable for false imprisonment.

The plaintiff being arrested as a deserter, and put in a lock-up until he could be sent to the nearest military post, asked permission to stay there until he could hear from Boston, rather than be sent a distance of 170 miles to a military post, and there take the chances of a still longer delay, in confinement. Permission was given accordingly, and he remained in the lock-up four days, when he was discharged. *Held* that this furnished a legal excuse for the detention, if it did not completely estop the plaintiff from bringing an action for false imprisonment.

Where probable cause for an arrest is shown, whether it appear from extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer, acting without malice or bad motive, will be protected, if acting in the line of his duty.

The unreasonableness of the time of detention is a distinct question from that of the first arrest, if the arrest itself can be justified.

THIS action is for falsely imprisoning the plaintiff, and charging it to be with a malicious intent to injure him. The defendant Butler was provost marshal of the 18th congressional district of the State of New York, and the defendant Marcellus was his deputy, under the act of congress of March, 1863. The defendants set up as a defense, in their answer, that the defendant Marcellus at the time, to wit, 31st August, 1864, had good reason to suspect and believe, and did suspect and believe, that the plaintiff was a deserter from the military service of the United States, and so suspecting and believing, as was his duty, arrested the plaintiff within said district and brought him before the defendant Butler, who was provost marshal of the 18th district, and thereupon the said defendant Butler detained and held the plaintiff in custody until he could

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ascertain whether he was a deserter, and no longer; which is the imprisonment complained of. The cause was tried at the Schenectady circuit, in October, 1867, when the complaint was dismissed, and judgment for costs entered for the defendants, from which the plaintiff appealed. The other material facts appear in the opinion.

D. C. Beatty, for the plaintiff

W. A. Dart, for the defendants.

By the Court, POTTER, J. The complaint of the plaintiff is on the ground that the defendants had not probable cause for the arrest and detention. Only two points are necessary to be considered, in the case. *First*. May an arrest be made on probable cause? And, *second*; had the defendants probable cause to make the arrest in this case, and to detain the plaintiff on such arrest? We may, at this stage of the examination, clear the case of two questions that sometimes are mingled with or have influence upon the facts of the case, and which are often *controlling of its results*, to wit, actual malice, and knowledge of the plaintiff's innocence by the defendants. The plaintiff was an entire stranger to the defendants, and therefore neither of these questions can be presumed against the defendants. No malice was claimed. This question was not controverted. This relieves the case of much of the embarrassment, which those questions, as facts, sometimes present; for it sometimes happens that the same act, done by the same person, proceeding from an evil or bad motive, is actionable, which would not be so actionable, if proceeding from the honest intent to discharge a public duty.

1. The question of probable cause, in actions for false imprisonment, has been a question that has been settled as an important one by the common law, from time immemorial. The absence of probable cause was always alleged

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in the declaration. (2 *Chitty on Pl.* 376, 377.) It was a necessary allegation. wrong — almost never a factor.

An important distinction is recognized in this class of cases, both in the English courts and in our own; and which distinction may determine this case, and should be stated here, so that it may be kept in view throughout the discussion. It is the distinction between an arrest made by, or at the instance of, a private person; and one made by magistrates and other police or public officers, where the defense pleaded is probable cause for the arrest. This distinction has never been questioned as existing in the law, though counsel do not always remember, or appreciate it. In the case of *Samuel v. Payne*, (*Doug. R.* 358,) tried before Lord Mansfield, he held "that a peace officer may justify an arrest, on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot;" and his lordship remarked, that this would be a most mischievous rule, applied to an officer; and afterwards, upon a rule to show cause, he held that the constable and his assistants were justified. One Payne, a private individual, gave the information to the constable upon which the arrest was made. Payne and the constable, and his two assistants, were all sued in an action for false imprisonment. On a new trial granted, Lord Mansfield again presided, and upon his charge a verdict was taken against Payne, and in favor of the constable and his assistants. To sustain this rule, a case was cited from the Year Book (7 *Hen. IV.*, p. 83, pl. 3.) This rule and distinction was also recognized in *Hopkins v. Crowe*, (7 *Car. & P.* 371,) and in *West v. Bazendale*, (67 *Eng. Com. L.* 141.) In our own court, in the case of *Holley v. Mix*, (3 *Wend.* 350, 353,) Ch. J. Savage laid down the rule thus: "If an innocent person is arrested upon suspicion, by a private individual, such individual is excused, if a felony was in fact committed, and there was reasonable ground to sus-

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pect the person arrested. But if no felony was committed by any one, and a private individual arrest, without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on," citing *Chitty on Cr. Law*, 15, and 3 *Camp*. 420. The same distinction is also repeated in *Brown v. Chadsey*, in the opinion of Emott, J., (39 *Barb.* 262, 263.)

We proceed, then, to the examination of the point, were the provost marshal and his deputy such officers as by law possessed the power to arrest the plaintiff on probable cause appearing to them for believing that he was a deserter?

By the 5th section of the act of congress, entitled "An act for the enrolling and calling out the national forces, and for other purposes," passed March 3, 1863, "all able bodied citizens between the ages of twenty and forty-five (with certain exceptions) were declared to constitute the national forces." Section 4 provided for the appointment in every congressional district, of one provost marshal, who should be subject to the orders of the provost marshal general, whose office should form a separate bureau of the war department. By section 6, it was made the duty of the provost marshal general, with the approval of the secretary of war, to make rules and regulations for the government of his subordinates. By section 7, *it was made the duty* of the provost marshals to arrest all deserters, whether regulars, volunteers, militiamen or persons called into service under that or any other act of congress, wherever they might be found, and to send them to the nearest military commander, or military post; and to obey all lawful orders and regulations of the provost marshal general," &c. The preamble of this act recited, as a reason for its passage, the existence of a state of insurrection and rebellion, and the necessity of a military force, &c. Without this preamble, the courts could take judicial notice of those matters. This act expressly made it the

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duty of provost marshals to arrest deserters. He was therefore a public officer; his duties concerned the public, and were connected with the administration and execution of justice; he was an executive officer. His office bore the same relation, in some respects, to the military courts, that sheriffs, marshals, constables and peace officers do to the civil courts. His acts performed by authority of law, are by "due process of law," within the meaning of the 5th article of the amendments to the United States constitution. (*Murray's Lessees v. Hoboken Land Imp. Co.*, 18 How. U. S. B. 272.) There can be no difference in the powers of the same character of offices, whether performing their duties under the general or the State governments; the common law prevails in both.

It being the duty of the provost marshal to arrest deserters, *when* may he arrest them? Must he wait until, by trial and sentence, they have been adjudged and convicted of desertion? Who then would be arrested, if trial is to precede the arrest? When would public officers be found to arrest, if at the peril of an action of false imprisonment in all cases where an acquittal follows? The proposition is absurd. The law has been otherwise settled for hundreds of years. *Hale*, in his *Pleas of the Crown*, (vol. 2, p. 85,) says: "There are certain officers and ministers of public justice, that '*virtute officii*,' are empowered by law to arrest felons, or those suspected of felony, and that before conviction or indictment; and these are under a greater protection of the law in execution of their office; 1st, because they are persons more eminently trusted by the law; 2d, because they are by law punishable if they neglect their duty in it." And he adds, "that they should have the greatest protection and encouragement in the due execution of their office. If persons that are pursued by these officers for felony, or for just suspicion thereof; nay, for breach of the peace, or suspicion thereof, such as night walkers, and persons unduly armed, shall not yield

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themselves to these officers, but shall either resist or fly, before they are apprehended, or being apprehended, shall rescue themselves, and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein because they cannot be otherwise taken, it is no felony in these officers or their assistants, though possibly the parties killed are innocent." "The officers I here intend, are justices of the peace, sheriffs, coroners, constables and watchmen, and when I mention these, I also include all that come in their aid and assistance, for every man in such cases is bound to be aiding and assisting to these officers upon their charge and summons in preserving the peace, and apprehending malefactors, especially felons." (*See also East's P. C.* 301; *Roscoe's Crim. Ev.* 743; 1 *Hill*, 170 and authorities, *supra*; *Wood v. United States*, 16 *Peters*, 342.) Such authority and power has never been questioned, and its exercise is a commendable duty. How, otherwise, in a state of war, insurrection or rebellion, could the rules of war and discipline of the army be maintained by the government? How, in the great cities of the land, could police power be exercised, if every peace officer is liable to a civil action for false imprisonment, if persons arrested upon probable cause shall afterwards be found innocent? Police authority would be a sham, its officers be made cowards, and government become a failure.

2d. The next question in order presented, is, had the defendants probable cause to arrest the plaintiff as a deserter?

Let us look at undisputed facts. There was then a state of rebellion existing in the country. The plaintiff had resided at Canajoharie, Montgomery county, but had been absent from there several years. He returned about August, 1863. He had been seen wearing a portion of soldiers' uniform. By a law of congress, the clothes, arms, military outfits and accoutrements furnished by the United States to any soldier were forbidden to be sold, bartered, ex-

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changed, pledged, loaned, or given away; and no person, not a soldier, who had possession of such clothes, &c., should have any right or interest therein. Any officer, civil or military of the United States, had the right to seize them, and the possession of them by any person, not a soldier or officer of the United States, should be *prima facie* evidence of a violation of this law. Both these defendants had been informed by a government officer, that this long absentee had returned, and was in possession of government clothes, and was believed to be a deserter. All these circumstances appeared before any pretended arrest was made. The plaintiff was then seen by the deputy, Marcellus, at the railroad depot in Schenectady, within a few rods of the provost marshal's office, and was invited to go there—arrested probably. When questioned he denied having been in the service; he denied having any soldier's uniform. Upon further examination he admitted having a uniform, and then attempted to explain how he came in the possession of it, viz: that he was in California; that Massachusetts was raising a regiment there; that he desired to come home, and they promised to make him a hospital steward, if he enlisted; that they gave him transportation, and subsistence to Boston, and there gave him the uniform; that he was cheated out of the place of hospital steward; that he left; that he had never been mustered into the United States service, and that he brought away his uniform. Taking this statement with its plain contradictions of his first statement with the admitted facts of being transported, subsisted and clothed by government, and unlawfully wearing away their uniform, and denying its possession, are the facts upon which the provost marshal acted. If any one could be found, in that day of desertions and bounty jumping, (which are matters of notorious history, and of which we may take judicial notice,) incredulous, or verdant enough, to believe in the truth or integrity of a story thus detailed, a part of

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which was known to be false, he would have been a most unfit person to perform the executive duties of provost marshal. Although, remarkable it is, as it turned out, the story of his never having been mustered into the service was true; but the felony of taking the government's clothing was fixed upon him. The falsehood as to the clothing, rendered more than suspicious the denial of being a deserter. It is not necessary to demonstrate further, that this statement presented probable cause to believe the plaintiff was a deserter. The question, whether the defendants had probable cause for the arrest upon undisputed facts, is a question for the court, not for the jury. (*West v. Baxendale*, 9 Com. B. 141. *Sutton v. Johnstone*, 1 Term R. 507, 545, per *Eyre, Baron*.) Per Lord Mansfield: "If the facts are in conflict, the jury must find the facts, and when found, it is a question of law, whether they amount to probable cause." (*Id.*) There is no conflict here, on the trial, as to any material fact in this case. The plaintiff's evidence in this respect agrees with that of the defendants. No point was raised or made on the trial that the arrest was made with motives of malice or oppression. The defendants were public officers. They had public duties to discharge. They were called to act in perilous, arduous and difficult times. They were invested with legal authority to act. The law of the country imposed upon them a public duty, for public purposes. They were punishable for neglect of duty, if they neglected to act in a case where there was sufficient or probable cause for acting. The safety of the government, and the discipline of the army, depended upon their fidelity, and the country was materially interested in their conduct. It was the duty of the court, in such a case, unflinchingly to come up to the standard of duty, and pass upon the questions that had been committed to, and appropriately belonged to them. It would be a reproach to a court, under such circumstances, if through timidity or a desire to shirk re-

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sponsibility, they should leave to the jury a question which, by the theory of our law, they are incompetent to try, to wit, whether probable cause for arrest had been shown. It is not only proper for the court, but by the wisdom of the sages of the law the courts are directed to give great latitude in the review of the acts of such officers. In the case of *Wall v. McNamara*, tried by Lord Mansfield, sitting at Westminster, in Michaelmas term, 1779, he said: "In trying the legality of acts done by military officers in the exercise of their duty, great latitude ought to be allowed; and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, as justices of the peace, for acts done by them in the exercise of their civil duty. The principal inquiry to be made by a court of justice is, how the heart stood? and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistakes." See also the sensible remarks of Rosekrans, J., in *Colton v. Beardsley*, (38 Barb. 29 and 45,) and cases cited by him.

This disposes of all I propose to say upon the acts of the defendants in making the arrest in question; and as to their having probable cause. I think the arrest was fully justified by the probable cause shown.

But another question is raised: that though the arrest itself might be justified, yet the period of imprisonment was unreasonable and unlawful; that on this ground the plaintiff is entitled to recover; and that this question has in fact been adjudicated. I am not wanting in respect to the opinions of a co-ordinate branch of this court; nor to the wisdom, integrity or patriotism of the learned jurist whose opinion has been cited to this point of the case. It is not at all certain that the facts in the case before us are identical with the case submitted to the court in the third district. I think, indeed, they cannot be entirely the same;

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and this difference would doubtless have produced the difference in the result there. Indeed the statement of facts, as contained in the opinion of the learned judge in that case, presents a clear difference. He says, "it does not appear that he (plaintiff) was kept in custody temporarily, with a view of being sent, as the law provides, to the time he was brought up to be sent to New York; nor that the length of time that he was thus kept in custody was necessary or proper, prior to his being taken to the proper place." With no certainty on this question of identity of cases, we must proceed to examine this point upon the facts before us, and apply the law as we understand it, to the case as it appears now. Whether the defendant was detained an unreasonable period of time in the lock-up at Schenectady, instead of being locked up elsewhere for a like or longer period, depends as much upon the requests of the plaintiff, which may estop him from complaining, and upon that and other facts which justify the defendants' action, as it does upon the interpretation of a statute which creates a liability by technical construction; or by judicial legislation in adding words to a statute not contained in it, against a public officer, whose duty it is to exercise, in a given case, his best judgment.

I do not however concur in the proposition contained in the adjudicated case, that assuming the arrest to have been authorized and justified, the burthen of proof was upon the defendants, when sued for false imprisonment, to show that the four days the plaintiff was imprisoned, was necessary and proper.

The seventh section of the act of congress (*Laws of the United States*, 1863, *ch. 75*) provides "that it shall be the duty of the provost marshals to arrest all deserters, whether regulars, volunteers, militiamen or persons called into service under this or any other act of congress, wherever they may be found, and to send them to the nearest military commander or military post." This is the whole of

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the duty of the provost marshal that is prescribed by law. Like all other statutes, it is to be reasonably construed. The statute is entirely silent as to the time within which the deserter shall be sent to the military post. The officer is bound to send him within some reasonable period. This reasonable period is generally a question of fact, dependent upon the exigencies of the case. If a deserter should be arrested every hour, and the nearest military post, as in this case, was 170 miles distant, it would be unreasonable that a file of men should be dispatched with each prisoner; especially so, if the enrolling board were engaged in preparing for or making a draft, or otherwise greatly pressed with duties. Not so, if the military post was in the same place. If the arrests would equal one per day, it might be deemed reasonable to dispatch them whenever five prisoners were collected; and if the arrests were still less, reason would dictate that the expense of the guard to be kept for that purpose, and the distance to be traveled to the military post, should be taken into consideration; and *tri-monthly* might be not deemed an unreasonable delay. At all events (I speak with due deference to published opinions) it is not a question of law, that without reference to the pressing duties, and the demands upon the time of public officers, and their necessary attention to other business of the public, four days is such an unreasonable detention that the officer was guilty of violating the language of a silent statute, and thus became liable for false imprisonment. Nor do I subscribe to the law, or the reason, of the proposition, "that if an officer has power to detain a prisoner for a few days, then he had the legal power to do so for a week, a month or a longer period." Would that learned court be willing to run this line the other way, and hold it to be good law? to wit: "If the officer had no power to detain the prisoner a few days, he had not the power to detain him one day, one hour or one minute." The proposition

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is as sound to run one way as the other. The proposition is a "*felo de se*." At all events, I do not subscribe to its soundness.

The evidence shows that at the time of the plaintiff's arrest, the provost marshal's office, in the language of the prisoner, "was crowded with people connected with the draft; there was an immense amount of business." They had three prisoners then in the lock-up, for desertion, besides the plaintiff; the fourth day from Hawley's arrest they, including Hawley, were to be sent to the military post. The plaintiff requested to be permitted to remain. His request was granted. He was permitted to remain, and the others sent off. It might have been a question of fact, perhaps, for a jury, to say whether, under such circumstances, the detention was unreasonable. Sure I am it was no violation of a statute, as was held. I am equally sure that we are at liberty to act upon our own judgment as to this question. In the case before us there was no request to go to the jury upon the unreasonableness of the detention; but it is seen that from the manner of conducting the trial, and from the argument and brief here, that the plaintiff relied, *first*, upon the want of probable cause; *second*, upon the innocence of the plaintiff of the charge; *third*, upon the law that the defendants had violated the statute; and *fourth*, upon the errors of the judge on the trial.

But there is another ground upon which I think the defendants are legally excused for the detention, if it does not completely estop the plaintiff from bringing the action. On the day of his arrest and examination in the provost marshal's office, he had stated that he was not on any rolls in Massachusetts; he had on that day retained Mr. Mitchell as his counsel, who was with him at the office. When Mr. Mitchell was there, the defendant Butler said something in the presence of the plaintiff, about writing to Boston. On that same afternoon, Butler, by his clerk,

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wrote to the adjutant-general of Massachusetts. The plaintiff himself testifies that Mr. Mitchell also asked permission to write or telegraph to the Governor of Massachusetts. He was arrested on Monday or Tuesday, and was kept until Saturday; on Saturday the sheriff brought him a letter from the Governor of Massachusetts; he sent the letter to Mr. Mitchell; Mr. Mitchell took it to Captain Butler, who on the same day discharged the plaintiff. It seems the plaintiff was taken to the office on a day before he was finally discharged, and there, he says: "I told Captain Butler I would like to remain, to hear from the Governor of Massachusetts." This was the day before he was discharged. His request was again granted. The plaintiff further testified that Mr. Mitchell telegraphed to the Governor of Massachusetts, "and I paid the expense." Is it not to be implied from this desire to have Butler write, and, by his counsel, telegraphing to Massachusetts, that plaintiff desired to stay where he was, until he could hear from Massachusetts, rather than be sent 170 miles to a military post, and there stand the chances of still longer delay in imprisonment. He says: "I told Captain Butler I didn't want to be marched through the streets of Albany, New York and Schenectady, as a deserter, and he sent me back to jail." This was at the time when he was about to be sent away with the other deserters. This feature could not have appeared in the case before the court of the other district; for they put their decision, somewhat strongly, upon the ground of too long detention at Schenectady. They would not have done this had it appeared that he was detained there at his own request. It is true, the opinion of that court is somewhat emphatic on the subject of the plaintiff's being detained, while he was protesting his innocence; and that, as it turned out, he was entirely guiltless. "In so doing," the court say, "they acted in violation of the statuté, and exceeded their authority." It must be conceded, I think, as was claimed

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on the argument, that this was one of the cases of arbitrary arrests, too common during the late rebellion; and it is not singular that the person arrested, not being a deserter, protested his innocence in that particular; but a public officer cannot in all cases accept of that as a defense. The guiltiest of felons have made the same protest. It is a safer rule, however, for courts to follow in such cases, to decide whether probable cause is, or is not, shown, than to rely upon the protestations of innocence of the persons arrested. I have never learned, before, that such protestations created a liability upon the arresting officer. And where there is probable cause, whether it appear from extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer acting without malice or bad motive, will be protected, if acting in the line of his duty; and we have already shown that the unreasonableness of the time of detention is a distinct question from that of the first arrest, if the arrest itself can be justified.

Upon the whole view of the case, therefore, we think probable cause for the arrest was shown, and there being no conflict in the evidence showing that the plaintiff requested the defendant to hold him in the lock-up, instead of sending him to the military post, until word could be obtained from Massachusetts, and that as soon as such word was received, in pursuance of such request, that the plaintiff was never mustered into the service, the defendant did discharge him, is a sufficient defense to the charge of unreasonable detention. The nonsuit was properly granted, and the judgment should be affirmed.

[WARREN GENERAL TERM, July 14, 1868. *James, Roskrans, Potter and Becker, Justices.*]

CHARLES I. and FRANCIS B. BALDWIN vs. THE UNITED
STATES TELEGRAPH COMPANY.

It being made the duty of telegraph companies, by statute, to transmit dispatches received from other companies of the same character, on payment of the usual charges therefor, when one company receives from another a message for transmission it is bound to send the same, with care and skill, and a reasonable dispatch, on receiving the compensation demanded; and for any neglect or breach of duty in transmitting such message, it is liable, either by virtue of a special contract, or one implied from its assuming the duty and receiving the compensation.

A telegraph company, being required by a statute to transmit messages received from other telegraph lines, on payment of the usual charges, having received its due share of the compensation paid to a connecting line for sending a message, there is a promise on its part, implied, at least, from its duty to the sender, and from its receipt of the consideration, that it will perform the duty.

And this promise, being made for the benefit of the sender, enures to him, to the same effect as a promise made immediately to him, and he can maintain an action for its breach.

Under the provisions of the statute making it the duty of connecting lines of telegraph to receive and transmit messages from other lines, where one company receives from another a message for transmission, it is to be implied in law, and the courts may assume it to be true, that arrangements have been made between the connecting lines by which the compensation agreed upon and received at the office which receives the message, is the full compensation for all the lines over which it is sent; and that, as between themselves, the proportion of consideration received or to be received by each line is understood and regulated. And this creates an undertaking on the part of each company with the sender of the message, that it shall be transmitted over its line, and delivered according to the contract made at the receiving office.

It is also implied, in law, that each separate line so connecting and acting in concert, has constituted the line receiving the message, its agent for making contracts over the lines of the others.

In an action against a telegraph company to recover damages for its failure to transmit a message, the complaint alleged that such message, after being delivered at the office of a connecting line, and paid for, was transmitted to the defendant, but was never sent by the defendant to the person to whom it was addressed. The answer alleged that by the contract under which the message was received by the defendant for transmission, it was stipulated that the defendant would not be responsible for delays, errors, and remissness on the part of connecting lines; that it only guaranteed entire correctness when messages were repeated back, for which repetition an extra

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charge would be made; and that such message was not repeated, nor requested to be repeated. *Held* that the answer set up no defense; neither delay, error nor remissness being charged, but an *entire omission* or *refusal* to send or deliver the message, which was admitted; and that an *entire* neglect and refusal to perform the contract did not bring it within the excepted terms.

An answer, in such an action, alleging that at the time of the delivery of the message to the defendant, it had established certain rules, regulations and conditions upon which it would accept and undertake to transmit and deliver messages, which rules &c. were well known to the connecting telegraph line from which the message was received, and that such rules &c. constituted the agreement in the case; but not alleging that it was an agreement made between the defendant and the plaintiffs, or that the latter had any knowledge or information of such rules &c., is also defective, and constitutes no defense to the charge against the defendant of a breach of duty.

The statute having imposed upon connecting lines of telegraph the duty of transmitting messages for each other; and the company receiving the message and the consideration, being the agent to make contracts for the other lines with which it is in connection; the contract of the agent is the contract of the principal which undertakes the performance of the duty, and may be enforced, if made within the legitimate business of the principal, or power of the agent. The private or other arrangement between the principal and its agent, not brought home to the party who contracts with the agent, does not affect the contract, as to such party.

By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless in terms it adopts or refers to the matter contained in some other answer, it must be tested, as a pleading, alone by the matter itself contains.

THE defendants are a corporation, duly incorporated under the acts of April 12, 1848, and June 29, 1853, and the various acts amending the same, whose general business is to receive and transmit messages over certain lines of wire through the State of New York, and other states. One of their lines extends from Syracuse, N. Y., to Rouseville, in the State of Pennsylvania; another corporation, incorporated under the same act, and which transacts the same kind of business, had a like telegraph line extending from Ogdensburgh to Syracuse, N. Y., and was called "The United States Branch Telegraph Company."

In November, 1864, the plaintiffs, as they allege, being the owners of certain interests in oil lands in Venango

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county, near Rouseville, Pennsylvania, which the plaintiffs were about to sell, but of the value of which they were ignorant, in order to learn such value one of the plaintiffs delivered at the office of the United States Branch Telegraph Company, at Ogdensburgh, a message in writing, to be sent to one Eric Darling, their agent at Rouseville, which was in the following words and figures:

“Ogdensburgh, November 16, 1864. To Eric Darling, Rouseville, Venango county, Penn., at Williams’ boarding house. Telegraph me at Rochester what that well is doing.
F. B. BALDWIN.”

Baldwin paid to the operator of said telegraph company, at the time, about two dollars, to obtain the transmission of such message; and on the following day Baldwin went to Rochester to receive the reply to the message, and to sell their interests, according to the information he should receive in reply. He remained in Rochester nearly a week, and received no reply; and then sold his said oil interest for \$3800.

Immediately after making such sale he received a message from said Eric Darling, dated at Rouseville, and which had been transmitted to Ogdensburgh, and thence repeated to him at Rochester, in the following words and figures, viz:

“Rouseville, November 25, 1864. To F. B. Baldwin. Well flowing 80 barrels. New well pumping twenty-five (25) barrels. Can sell your interest for five thousand (5000) dollars. Telegraph me, refusal for ten days. Have Perry transfer to me.
E. R. DARLING.”

The plaintiffs then allege that their message was correctly transmitted to the defendants at Syracuse, on the day of its date; that it was then put upon the defendants’ lines, and was never transmitted by the defendants to said Eric Darling, who at the time, and long afterwards,

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was at Williams' boarding house, Rouseville; that the plaintiffs' interests were, at that time, and for weeks afterwards, over the value of \$5000 and upwards; that had the message been transmitted and delivered as directed, the intelligence they afterwards received from said Darling would have been directly transmitted to said F. B. Baldwin, at Rochester, and would have prevented a loss of \$1200; and that they did actually sustain a loss to that amount, by reason that the defendants failed to transmit such message.

The defendants set up various defenses, the sixth, seventh and eighth divisions of which, only, come in question. The sixth answer set up that the plaintiffs' message was written upon a certain printed blank, in the words following:

"United States Branch Telegraph Company. Terms and conditions on which messages are received by this line for transmission.

This company will endeavor, by good faith and due diligence, to merit the confidence of the public. It will not be responsible for delays, errors and remissness on the part of connecting lines, and only *guaranties* entire correctness when messages are repeated back from the place to which they are sent; for which repetition a small extra charge will be made.

(Signed) JOSEPH OWEN, General Superintendent."

And the defendants alleged that such writing by the said F. B. Baldwin, on said blank paper, and the acceptance thereof by the said United States Branch Telegraph Company, constituted the contract by which said last mentioned company undertook to send the said message to Rouseville; and that the said message was not repeated, nor requested by the plaintiffs to be repeated.

The seventh answer set up for a separate defense that at the time of the delivery of the said message to the said

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United States Branch Telegraph Company, and at all times thereafter, the defendants had established certain rules, regulations and conditions, upon compliance with which it would and did accept and undertake to transmit and deliver correctly telegraph messages, and without compliance with which it would not, and did not, so undertake. That such rules, regulations and conditions were printed by it upon the blanks used by senders of messages for writing thereon their said messages; and that said rules, regulations and conditions were publicly known, and were well known to the said United States Branch Telegraph Company, and their officers and servants, and were in the words following:

“In order to guard against error or delay in the transmission or delivery of messages, every message of importance ought to be repeated, and sent back from the station to which it is directed to the station from which it is sent, and compared with the original message. Half the tariff price will be charged for thus repeating and comparing.

And it is hereby agreed between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made, and paid for, at the time of sending the message, and the amount of risk specified in this agreement; and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of the same, beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified on this agreement at the time; nor shall this company be held liable for errors in ciphers or obscure messages, nor for any errors or neglect by any other company over whose lines this message may be sent to reach its destination; and this company is hereby made the agent of the signer of this

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message, to forward it over the lines of other companies when necessary.

No agent or employee is authorized or allowed to vary the terms of this agreement, or make any other verbal agreement; and no one but the superintendent is authorized to make a special agreement for insurance.

This agreement shall apply through the whole course of this message, on all lines by which it may be transmitted."

And the defendants alleged that the said message was received by them to be transmitted for the said United States Branch Telegraph Company, upon the understanding and agreement that the defendants were not to be liable for any error or delay in the transmission or delivery of said message, or liable in any way in respect to said message on account of receiving the same, unless the said United States Branch Telegraph Company requested and paid to have the same repeated; that it did not request to have the same repeated, nor was it repeated in the manner provided for in said rules, regulations and conditions, nor in any way; and that said message was transmitted by the defendants from Syracuse correctly in all respects, but that the same was understood by the operator of defendants at Rouseville to be addressed to *E. R. Cooley*, instead of *Eric Darling*; and that the same was correctly written out in all respects, except as to said name, and was left at Williams' boarding house at Rouseville. And the defendants averred that the business of transmitting telegraphic messages is such that it is impossible to transmit messages correctly, with certainty, unless the same be repeated in the manner referred to, and described in the rules and regulations of the defendants above set forth, and in the printed blank above referred to; that the error in said name was not caused by any negligence or design on the part of the defendants, or in any of their servants or agents, and that the same could have been

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corrected or prevented only by having said message repeated in the manner above referred to.

The eighth answer set up as a further and separate defense, that it was the duty of the plaintiffs, in the exercise of ordinary prudence in the transaction of business, to procure the dispatch first set forth in the complaint to be repeated, or to make inquiries whether it had reached its destination, or to send a new dispatch to their agent, or to use other means for securing the information which they sought in regard to their alleged interests, before completing the alleged sale thereof to said Thompson; that they had ample opportunity, time and means, to do all and each of those things, before completing said sale, and after the alleged sending of their first dispatch; and that by doing so they could have prevented the alleged damage; that the plaintiff did not have the said dispatch repeated, nor inquire whether it had reached its destination, nor send a new dispatch to their agent, nor use any other means, nor take any other precautions for procuring information respecting their alleged interests, after sending their first dispatch, and before completing said sale; and that in all and each of these respects they were guilty of negligence, and that said negligence on their part was the cause of the damage which, as they allege, they have sustained.

To the said sixth, seventh and eighth answers the plaintiffs severally demurred, on the ground that they did not state facts sufficient to constitute a defense.

This presented the question to be decided. The court at special term held the sixth and seventh answers sufficient, and the eighth insufficient; from which both parties appealed—each from so much of the decision as was adverse to themselves.

Foot & James, for the plaintiffs.

George W. Soren, for the defendants as respondents.

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disbelieve him. Some of the questions I think, were objectionable; but recalled for or received, which might as inadmissible upon objections presented there is abundance of testimony both and clearly admissible, to sustain the I do not think any possible injury done by the answers to the questions think the judgment should be affirmed.

[MONROE GENERAL TERM, September 2, 1867
Smith, Justices.]

**THE PEOPLE, *ex rel.* The Board of
Saratoga Springs, vs. WILLIAM BEN-
MAN and HIRAM TEFT, Trustees of
Saratoga Springs.**

Where the board of trustees of an incorporated village, three of whom voted to raise by tax a rate to be raised, and three voted against the act of the board was, in legal effect, a nullity for the reason that a majority did not vote in favor of it. Neither the officers created by the act of April 1867, several school districts and parts of districts within the village of Saratoga Springs, and to the schools therein," (*Laws of 1867, ch. 353*), within that village, are county, city, town or of the first and second branches of section 2 of the constitution.

The third branch of section 2 of said 10 articles, in its scope and language, not only also all officers whose offices might be the education, and the like.

Hence, whether the officers named in the act of 1867, trustees, or members of "the board of trustees or character of school officers, and

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tiffs with the United States Branch Company was the contract between the parties. Then, so far as this answer is concerned, this agreement is the contract by which the defendants entered upon its performance. By this agreement the defendants exempt themselves from liability on account of *delays, errors or remissness* on the part of connecting lines.

No act, however, or omission, or delay, error or remissness of any *connecting* line, is complained of by the plaintiffs. The complaint is against the defendants' own line. This part of the contract, therefore, and the exemption stated, does not apply to their defense. The remaining part of this alleged contract is the ground of their defense, to wit, "that they only *guaranty entire correctness* when messages are repeated back from the place to which they are sent; for which repetition a small charge will be made."

Assuming that the duty imposed by statute demanded of the defendants that they should transmit this message, and that they have received their due share of the compensation paid by the plaintiffs for the performance of the duty, it follows, logically, that there is a promise on their part, implied, at least, from their duty to the plaintiffs, and from their receipt of the consideration, that they will perform it; and this promise, being made for the benefit of the plaintiffs, enures to them to the same effect as a promise made directly to them, and they can maintain an action for its breach. Under the provisions of the statute making it the duty of connecting lines to receive and transmit messages received from other lines, connected with the fact that the defendants did receive the plaintiffs' message, it is to be implied in law, and the courts may assume it to be true, that arrangements have been made between the connecting lines, so that the compensation agreed upon and received at the office which receives the message, is the full compensation for all the lines over which it is

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sent; and that, as between themselves, the proportion of consideration received or to be received by each line is understood and regulated between themselves; and this creates an undertaking or engagement on the part of each company with the sender of the message, that it shall be transmitted over their line, and delivered according to the contract made at the office at which the message was received; and it is also implied in law that each separate line so connecting and acting in concert has constituted the other—that is, the line which receives the message—its agent for making contracts over the lines of both.

Assuming the truth of this sixth answer, what, then, is the contract between the parties which we are now considering?

It was to send this message for a consideration then agreed upon between the parties, without a request to have the message repeated back, which repetition, *if requested*, would have called for a still *larger* compensation, and which larger compensation would have secured to the plaintiffs the *guarantee* of the defendants of the entire correctness.

The contract, then, was that the defendants would not be liable for *delay*, *error* or *remissness*. These being the only particulars specified in the terms and conditions of the special contract, they cannot claim exemption or release from any which by their contract they were bound to perform, other than such as are expressly specified. They cannot, in law, receive the consideration and be bound in duty, and then neglect or refuse to perform the duty at all. The complaint charges, not any *delay*, *error* or *remissness*, but that the message was never transmitted at all by the defendants to Rouseville, nor delivered to the said Eric Darling, who it is charged was then, and for a long time afterwards, at the place where the message was directed by the plaintiffs. This is denied by the sixth answer, which for this purpose stands alone. An

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entire neglect and refusal to perform this contract, by the defendants, does not bring them within the excepted terms. "Delay" in sending and delivering a message, implies that it was or would be sent at some time, but not sent or delivered promptly. "Error" in sending or delivering a message, implies sending or delivering a *wrong* message, or to the wrong place or person. "Remissness" also implies a sending or delivering, but in a tardy, negligent or careless manner. It is neither delay, error nor remissness that is charged, but the entire omission or refusal to send or deliver the message, and this is admitted. It is true that it is stated in the complaint that the message was correctly transmitted to the defendants, and was then put upon their lines. The meaning of putting it upon their lines is not explained by either pleading, and whether or not it was sent on the wires we are not informed; but as this expression is immediately followed by the positive allegation that it was never transmitted, we cannot assume that it was, or that these two allegations, unexplained, are in conflict, but they must be construed to be in harmony. Then, in legal view, it comes to this: the defendants were employed and paid to transmit a message for the plaintiffs. This undertaking it was the defendants' duty to perform. They agreed to perform it; they failed to perform, and are guilty of a breach. I know of no reason why they are exempt from the same legal liabilities as would be any other party, whether professional or mechanical, who offers to perform duties, and who undertakes to perform, who receives a compensation for performance, and fails in the undertaking.

Whether damages are nominal, or actual and plenary, we are not called upon to decide. The answer sets up no defense.

I think, therefore, the judge at special term erred in overruling the demurrer to the sixth answer. This answer sets up and claims that the duty was performed under

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and by virtue of the special contract therein set forth, but does not show that the defendants performed according to that contract, but admits a failure.

The seventh answer sets up a different special agreement, under which the defendants undertook the performance; but they do not allege or claim that it was an agreement made between them and the plaintiffs, or that the plaintiffs had any knowledge or information of the terms, rules, regulations or conditions by which they were regulated in the transmission of messages, which they claim constituted the contract. If we are right in the position that the statute having imposed the duty upon connecting lines of transmitting messages, for each other, and that the company receiving the message and the consideration is the agent to make contracts for the other lines with which it is in connection, then the contract of the agent is the contract of the principal who undertakes the performance of the duty. The contract made by the agent, whether it arises from implication of law or by express special terms, is the contract which may be enforced, if made within the legitimate business of the principal, or power of the agent. As between the agent and third parties, the apparent authority is the real authority. The private or other arrangement between the principal and their agent, not brought home to the party who contracts with the agent, does not affect the contract as to such party. What the contract was between the plaintiffs and the United States Telegraph Company, the defendants, is not set up in this seventh answer; and the private agreement between the latter and the defendants, or the knowledge of the branch company in relation to the terms, regulations and conditions of the defendants in their transmission of messages, is a matter of no importance, and constitutes no defense to the charge against the defendants of breach of duty. In this view it is not necessary to discuss what would have been the rights of the parties had

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the plaintiffs sent the message from the defendants' office, written upon one of *their* blanks, containing *their* rules, conditions and regulations, as to their terms of transmitting messages.

But even if these rules, regulations and conditions were in legal effect to be brought to the plaintiffs' notice, there would still be a liability on the part of the defendants, as their conditions admit, to the amount of the consideration received by them for their agreement to transmit, and the breach of duty in this respect; and the answer would then admit a limited liability on the part of the defendants. I think, therefore, the special term was in error in overruling the demurrer to this seventh answer.

The eighth answer of the defendants sets up a want of the exercise of ordinary prudence on the part of the plaintiffs in respect to procuring the dispatch to be repeated, or to make inquiries whether it had reached its destination, or to send a new dispatch to their agent to ascertain whether the first had been received, or by other means to obtain the information they desired; and that by reason of these neglects and omissions they were guilty of negligence, &c.

By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested, as a pleading, alone by the matter itself contains.

Examining this answer by the rule we have stated, as an answer to the charge of the omission to transmit a message for which they have been paid, and which it was their duty to send, they do not even allege, directly, that they transmitted the message, or make any reference to the terms, conditions or rules which were made to control the contract. The court cannot, as matter of law, adjudge that ordinary prudence required that the plaintiffs should

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have had the dispatch *repeated*; or that they should do any act, or take any other precaution than that of making the dispatch, delivering it to the defendants or their agents, to be transmitted, and pay the charges demanded for the service.

The law, then, casts the burden upon the defendants of showing, by an answer, a performance, or a good legal excuse for the non-performance, of their obligation. This answer is entirely deficient in setting up any defense except negligence, and this only in a manner which the court cannot adjudge as a question of law. The special term, therefore, correctly sustained the demurrer of the plaintiffs to this eighth answer.

I do not take the ground that the defendants are common carriers, nor that they may not limit their liability by special contracts, nor even that writing the dispatch upon the printed blank kept by the telegraph company may not bind the sender by the terms of the rules, regulations and conditions printed thereon, whether they were read by the sender of the message or not. But taking the rules, regulations and conditions set forth in the sixth answer to be the terms of the said branch company, to wit, that they only guaranty entire correctness when messages are repeated, and such repetition paid for, by an extra charge—the agreement in question is not brought within those terms. The extra charge was not paid, and no request was made to have the message repeated, and of course no *guarantee of entire correctness* was made by the defendants, or by their agent.

The message, however, was delivered, and its transmission paid for. What, then, was the contract? Had the plaintiffs required its repetition, it would have come within the terms of the guarantee, and the contract would be clear; but the company do transmit messages without the guarantee, and for a consideration paid for so doing. What, then, are the liabilities of the party undertaking?

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Can they receive the consideration money, and refuse to send it? Can they send it part of the way, and refuse to send it further? Does the party who pays for the transmission take upon himself all the risks whether or not the company will perform their duty and send it? Is this reasonable? Is this law? I think not. There was an undertaking of some kind, in law, from the parties who received the message. If it did not come within the terms of the special agreement, then it is left as if there was no special agreement; and the agreement is such as the law implies, and there is an admitted breach. True, the printed notice upon which the message was written informed the sender that, for a certain *additional* charge, he could obtain a guarantee, but the plaintiffs chose to have it transmitted without the guarantee, and, of course, his remedy is precisely such as it would have been had there been no printed notice. I do not notice, further, the special terms of the contract set up in the seventh answer, for the reason that I have held that there is no allegation that any contract was made by the defendants with the plaintiffs, and that enough was not shown to bring the plaintiffs within its terms.

I am of opinion, therefore, that neither of the answers numbered *sixth*, *seventh* or *eighth* does set forth facts sufficient to constitute defenses to the matters set up in the complaint.

There should be a reversal of the order of the special term as to the sixth and seventh answers, with costs of the appeal and costs below; and the order of the special term as to the eighth answer should be affirmed, with costs of the appeal, with liberty to the defendants, on payment of costs, to answer over as to the said sixth, seventh and eighth answers.

Ordered accordingly.

[ST. LAWRENCE GENERAL TERM, October 1, 1867. James, Roskrans and Potter, Justices.]

FORBES vs. WILLARD, impleaded, &c.

An order made by the court, in proceedings supplementary to execution, directing a defendant to be punished for a contempt in not answering questions propounded to him concerning his property and business, is an appealable order, under the Code, (§§ 248, 349,) as affecting a substantial right.

Where a witness declines to answer questions propounded to him, on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if required to be given; and if not, he should be required to answer the questions.

The provisions of the Code respecting the examination of judgment debtors, on proceedings supplementary to execution, were intended to give the creditor complete authority for a full and searching examination of the debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor has made, or attempted to make, of his property. And by section 467 it is provided that its enactments are not to be strictly construed.

The object intended by the amendment to section 292, made in 1863, providing that the debtor shall not "be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property, for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution," was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatsoever, on account of the purposes for which he might have disposed of it.

It could not have been the intention to restrict the inquiry to cases where formal instruments of conveyance, or assignment, had been made and delivered by him; but was to include within it all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property. And it seems to have been the intention to extend the right of examination to cases where the transfer should prove to have been made by an actual delivery, following or accompanying an agreement by parol.

Hence, under this amendment, the debtor may properly be required to answer fully concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise; notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it; and without any qualification or restriction arising out of the nature or character of such crime.

In discovering the facts in reference to the source from, and the means by which he may have acquired property, the debtor may be compelled (if he is required to answer) to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1863. This he cannot properly be required to do,

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however, unless the case is brought within the 5th subdivision of section 292 of the Code.

The provision of the Code, declaring that "no person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud," is not to be limited simply to a fraud in the disposition of the debtor's property, but extends to any fraud whatever.

Where the debtor being required to state whether he received of the plaintiff a specified sum of money, in Canada currency, at Toronto, in December, 1865, and whether he had any, and if any, what business in his own name, since November, 1865, declined to answer, on the ground that his answers would tend to show that he had been engaged in a conspiracy to defraud the public by negotiating spurious drafts; in other words, that he had acquired his property by the commission of a fraud; *Held* that the questions were pertinent to the inquiry the creditor was authorized to make, and that the debtor was bound to answer them.

UPON the examination of the defendant before a referee, in proceedings supplementary to execution, the following interrogatories were propounded to him by the plaintiff's counsel, viz: 1st. Whether he had seen the plaintiff, about the middle of December, 1865? 2d. Whether, about that time, he received from him, at Toronto, about \$3060, in Canada currency? 3d. Whether he received any, and if any, how much money, in Canada, in December, 1865? 4th. Whether he had in his possession, in December, 1865, money or currency amounting to \$3000? 5th. What money, in bills or coin, he paid out or delivered to any person or persons, in December, 1865, or at any time since then, and the consideration for such payment or delivery? 6th. How much money he had, in December, 1865, or at any time since then? 7th. Whether, since November, 1865, he had done any business in his own name, and if he had, what the business was? 8th. The amount in value he had, at any one time, of the proceeds of his own business transactions, since November, 1865? 9th. What other money or property he had had, except what was derived from the farm, since November, 1865?

The defendant declined to answer these interrogatories,

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on the ground that his answers would tend to convict him of a crime other than the crime of fraud. The particular crime was stated, in his objection to answer some of the interrogatories, to be that of conspiracy.

The refusals of the defendant to answer were certified by the referee to the county judge of Niagara county, who issued an attachment against the defendant, on which the latter was arrested and taken before the county judge. Interrogatories were thereupon filed with the county judge, which the defendant was required to answer. In his answers, by way of justifying his refusals to answer before the referee, he stated that he had been arrested on a warrant issued by the police justice of the city of Lockport, on a complaint made against him by the plaintiff's counsel, charging him with the crime of conspiring with others to cheat and defraud the plaintiff and the public generally, by means of false and fraudulent drafts purporting to have been issued by the Canton Banking House, and obtaining money and property, by means of false drafts, from the plaintiff and the public generally. The judgment in this action was recovered for money advanced by the plaintiff in discounting these drafts; and in declining to answer the interrogatories propounded to him, the defendant offered to answer as to any other business transaction by him, and as to any other money or property he had received, except such as was connected with, or derived from, drafts drawn by the Canton Banking Company.

The county judge held that the defendant was bound to answer these interrogatories, and having overruled his objections to doing so, ordered a commitment to issue against him, committing him to the jail of Niagara county, until he should submit to answer, or be otherwise discharged, and imposed a fine upon him, sufficient to indemnify the plaintiff for the costs and expenses of the proceedings.

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This order having been entered with the county clerk, the defendant appealed from it to this court.

Richard Crowley, for the appellant.

A. W. Brazier, for the respondent.

By the Court, DANIELS, J. The plaintiff's counsel objected, upon the argument of the present appeal, that the order made by the county judge was not appealable, and relied upon *Mitchel's case* (12 Abb. 249) in support of the objection. That case affords the plaintiff no assistance whatsoever in that respect. It was an appeal taken in a proceeding against an attorney, for a contempt in the course of the trial of an issue of fact. And the order of the court made in that proceeding was held not to be appealable. The question whether an order made for the punishment of a party for not answering in proceedings supplementary to execution, was appealable or not, was in no manner involved in the case. The right of the party affected by such an order to appeal, is dependent upon the provisions of the Code of Procedure relating to proceedings supplementary to execution, and not upon the statutory provisions relating to proceedings for the punishment of contempts.

As to the former, the Code provides that appeals may be taken to the general term of this court from orders made by a county judge, in such proceedings, where the order appealed from affects a substantial right. (*Code*, §§ 248, 349.) And certainly few, if any orders, can be made in such proceedings, more serious or certainly affecting substantial rights, than those which deprive the party of his liberty for an indefinite period of time, as the order in controversy clearly does the defendant. In the case of *Clapp v. Lathrop*, (23 How. 423;) *Holstein v. Rice*, (15 Abb. 307;) and the *National Exchange Bank v. Hanington*, (decided in this district,) no doubt was entertained

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but an order made in these proceedings directing a party to be punished for a contempt in not answering questions propounded to him concerning his property, was an appealable order under the provisions of the Code, already referred to. And these clear and ample provisions leave no room for any substantial doubt upon that subject. The objection that the order is not an appealable order, must therefore be overruled.

Where a witness declines to answer questions propounded to him on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if they are required to be given. (*Cowen & Hill's Notes, 2 Phil. Ev. part 2, 737, 739, and cases there cited.*) And when it is fairly ascertained that such will not be the effect of the witness' answers, he should be required to answer the questions put to him. Under this rule the defendant should certainly have answered the fourth, sixth, eighth and ninth interrogatories propounded to him. By these he was required to answer, whether in December, 1865, he had in his possession money or currency, amounting to \$3000? How much money he then had, and how much at any one time, since November, 1865, he had had of the proceeds of his own business transactions, except what had been derived from the farm?

These answers would not have had any tendency to criminate the defendant, for they do not ask him to disclose the source, person or circumstances, from or under which the money or property had been derived. They inquire simply as to the fact of his having had money in his possession after the month of November, 1865.

The fifth interrogatory propounded, was within the spirit of the amendment made to section 292 of the Code in 1863. By that interrogatory he was asked to state what money, in bank bills or coin, he had delivered or paid to any other person or persons, since December, 1865, and

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the consideration for such delivery or payment? The provisions of the Code were intended to give the creditor complete authority for a full and searching examination of the judgment debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor had made or attempted to make, of his property. And by an express provision, its enactments are not to be strictly construed. (§ 467.)

By the amendment to section 292, made in 1863, it was provided that the debtor shall not "be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." The object plainly intended by this amendment, was to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatsoever on account of the purposes for which he might have disposed of it. It could not have been intended to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him; but to include within it all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property. No reason existed for extending this right of examination to cases where the debtor had made a written conveyance, assignment or transfer of his property, which did not also require it to be extended to cases where the transfer should prove to be made by an actual delivery, following or accompanying an agreement by parol.

On the other hand, not only the same propriety, but the same necessity, required that it should be equally provided for all cases alike. And from the language made use of, it may be fairly inferred, that it was the intention of the legislature so to extend it by the enactment of this amend-

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ment. Otherwise the word "transfer" would not have been used; for the terms "conveyance" and "assignment" were themselves sufficiently comprehensive to include all those cases where the debtor disposed of his property by deed or other instrument in writing.

When the debtor delivers over to other persons his personal property, or choses in action, by way of performing agreements made to defraud his creditors, even though it may be done without any writing whatever, he practically and effectually does execute a transfer of such property and choses in action, within the fair intendment of those terms as they are used in this amendment. It could not have been intended by the amendment that the debtor should be excused from answering, where the transfer should prove to be made without writing, and to require him to answer if it was attended with the only additional circumstance of being made by writing. No reason exists for making any such discrimination. On the other hand, it would be unnatural as well as absurd. Under this amendment, therefore, the debtor may properly be required to answer fully concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise, notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it, and without any qualification or restriction arising out of the nature and character of such crime.

The other interrogatories propounded to the defendant which he refused to answer; do not relate to the disposition which the debtor may have been supposed to have made of his property, or to the property he merely had in his possession or under his control. But they have reference to the source from, and the means by, which he may have acquired it. And in discovering these facts the debtor may be compelled, if he is required to answer, to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the

protection of the amendment of 1863. This he could not properly be required to do, unless the case is brought within the fifth part of section 292 of the Code. For the rule of the common law is well established, that no person, whether a witness or a party, shall be compelled to answer when examined on oath as such in a judicial proceeding, where the effect of his answer would be to expose him to a prosecution for a crime. (*Henry v. Bank of Salina*, 1 *Const.* 83. *Short v. Mercier*, 1 *Eng. Law and Eq.* 208.) And that rule continues to exist in full force, so far as it has not been abrogated by positive legislation.

In these proceedings, such legislation, so far as it becomes necessary at present to consider it, extends no further than to require that the party or witness shall answer, even though his answers may show that he has been guilty of a fraud. The case of *Clapp v. Lathrop* (23 *How.* 423) was relied upon on the argument as an authority favoring the restriction of this provision to cases of fraud in the disposition of the property of the debtor. But the question whether it should be so restricted, was not presented in that case. And the decision itself does not indicate that the court pronouncing it intended to decide that point. The provision in the Code is subjected to no such limitation. By that it is declared that "no person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud," (*Code*, § 292,) not simply of a fraud in the disposition of his property, but of any fraud whatsoever.

Wherever one person is guilty of a fraud in disposing of his property, the other who receives it from him with a like intent, is also equally guilty of a fraud. And yet, under this provision, the latter would be clearly bound to answer. The peculiar nature or quality of the fraud, the answers of the party or witness may tend to show he has committed, is not important. Neither does his obligation

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to answer depend upon the circumstance that the party or witness interrogated may or may not have committed the fraud alone; such a construction would be so restricted as to render this provision of the law of scarcely any practical benefit. Wherever the party or witness interrogated may have committed a fraud, whether solely, or united and combined with others, it is still a fraud within the intent and meaning of the language used in this section; and the necessary disclosure of it by the answers required to be given in the course of the examination for the discovery of the debtor's property, constitutes no legal justification for the party or witness, who on that account refuses or declines to answer the questions propounded to him for that purpose. Whether the fraud has been committed in disposing of, or in receiving, purchasing or otherwise acquiring the property which forms the proper subject of such an examination, and its disclosure is required in the lawful and legitimate course of the examination for the purpose of making the discovery the creditor is entitled to demand concerning the property of his judgment debtor, neither the debtor nor any witness produced by him or the creditor, is at liberty to shield himself from answering, because the answers required will lead to that disclosure. The questions, of course, must be pertinent to the inquiry which the law allows to be instituted by the creditor against the judgment debtor. Where they are not so, both the debtor and the witnesses produced in the course of the examination would be entitled to be protected in refusing to answer them.

The questions in this case were pertinent to the inquiry the creditor was authorized to make. By them the debtor was required to state whether he received of the plaintiff about three thousand and sixty dollars, in Canada currency, at Toronto, in December, 1865; whether he received any, and if any, how much money in Canada, in December, 1865; and whether he had done any, and if any, what

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business in his own name, since November, 1865. These questions he declined to answer, on the ground that his answers would tend to show that he had been engaged in a conspiracy to defraud the public, by negotiating and selling spurious drafts. In other words, that he had acquired his property by the commission of a fraud. Whether that fraud affected the plaintiff alone, or whether its successful execution affected a large portion of the public, can make no difference in the construction of the language the legislature have used. It is still a fraud, and it is no more than that, even if the defendant did conspire and combine with others in the commission of it; and as such he was bound to disclose it, if its discovery became essential to the complete examination the creditor had a right to prosecute, for the purpose of ascertaining the nature, condition, extent and situation of his property. That it was essential to that end was not denied upon the argument of the present appeal. The order appealed from should therefore be affirmed.

[ERIE GENERAL TERM, February 10, 1868. *Davis, Morris and Daniels*, Justices.]

 VIANY vs. FERRAN.

A lease provided that if the lessee, having performed his covenants, should give notice in writing, on or before February 1, 1868, binding himself to take and accept a further term of five years from May 1, 1868, the lessor would grant a new lease for such further period. It then provided for the fixing of the rent by arbitration, &c., but gave no option to the lessee to accept or reject the lease after the arbitrators should have acted. *Held* that the lessee's obligation to take the new lease became perfect as soon as he gave the notice binding himself to accept another lease for the further term.

That the moment that notice was given, the obligation of the lessor to grant, and of the lessee to take, the new lease became perfect and mutual.

That the appointment of arbitrators being an act only to be done after notice that the new lease was to be taken, neither party, after making the appointment, could be heard to assert that the notice had not been given.

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If, in such a case, the arbitration having been commenced, falls through, by reason of the inability of the arbitrator to complete it, and the failure of the parties to agree upon another arbitrator, the lessee may maintain an action to compel a specific performance of the agreement to execute a new lease, at a rent to be settled and determined upon a reference.

MOTION to dissolve an injunction. This was an action to obtain the specific performance of a covenant in a lease of real property, for a renewal, at a rent to be fixed by arbitration. The parties had agreed upon Judge Daly as their arbitrator, or referee, under the covenant in the lease; and he having been unable to attend to the case, they had not agreed upon any other. The relief sought in this action was that the defendant be directed to proceed on his part with the arbitration, and to appoint another, in case the arbitrator appointed by the defendant should refuse to act; and that the defendant be directed and required to execute a lease at the rent to be settled and determined on, as provided by the original lease and the covenants therein contained.

J. H. Pignolet, for the plaintiff.

H. Alker, for the defendant.

CARDOZO, J. I think the learned counsel for the defendant misconstrues the provisions of the lease as to the renewal. The lease provides that if the lessee, having performed his covenants, gives notice in writing, on or before February 1, 1868, *binding* himself to take and accept a further term of five years from May 1, 1868, the lessor will grant a lease for such further period. It then provides for the fixing the rent by arbitration, and instructs the arbitrators as to the "principle" by which they are to govern themselves, but it gives no option to the lessee to accept or reject the lease, after the arbitrators have acted. It simply very inartificially prescribes a rule of action for the arbitrators. The lessee's obligation to take the new lease

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becomes perfect as soon as he give the notice *binding* himself to take and accept another lease for the further term. The moment that notice is given, the obligation of the plaintiff to grant, and of the defendant to take, the new lease, becomes perfect and mutual. Whether the allegation in the complaint, that the plaintiff gave the notice that he would take the further term, be denied or not, is not material, because both parties are estopped, on that point, by having proceeded to appoint arbitrators. That appointment being an act only to be done after notice that the new lease was to be taken, neither party, after making the appointment, can be heard to assert that the notice had not been given. The case then is briefly this: The parties have entered into a covenant for a renewal of the lease, which, by the notice served by the plaintiff, became mutual and obligatory upon both of them, and there is nothing to be done except to ascertain the rent, and that was to be fixed by arbitration. The arbitration was commenced, but fell through by reason of Judge Daly being unable to devote sufficient time to complete it, and the parties failing to agree upon any other arbitrator.

In *Kelso v. Kelly*, (1 *Daly*, 419,) Judge Daly, reviewing the authorities, says: "Where a valid contract has been entered into for the renewal of a lease by which it is provided that the amount of rent to be paid shall be settled by arbitration, and the party who is to give the lease refuses to appoint an arbitrator, a court of equity will compel specific performance, and order a reference, to ascertain what the amount of the rent should be." (*See also Wells v. De Leyer*, 1 *Daly*, 45.)

This I understand to be the settled law of this State, and I regard the principle as applicable to and decisive of the question in this case.

The motion to dissolve the injunction must, therefore, be denied. The costs may abide the event of the action.

THE PEOPLE, *ex rel.* Charles Newman, *vs.* THE SAILORS'
SNUG HARBOR.

By the act incorporating a charitable asylum, the trustees were authorized to make all proper and necessary rules and regulations for the government of the corporation, not inconsistent with the constitution and laws of the United States and of the State of New York. *Held* that by-laws adopted by the trustees forbidding the inmates to leave the premises without permission from the governor of the asylum, or one of his assistants, or indulging in contention, or boisterous and disorderly conversation at table, on pain of expulsion, were reasonable, proper and valid; and that for a breach thereof, by an inmate, the governor was authorized to dismiss the offender from the institution, by the direction of the executive committee.

But that on a charge being preferred against an inmate, of violating the rules, he was entitled to reasonable notice of the examination, and an opportunity of being heard, of exculpating himself and of disproving the charge.

The action and proceedings of the trustees, or the executive committee, in investigating such a charge, *if seems*, are not beyond the control of, or a review by, the Supreme Court.

It *seems* that the governor of such an institution has no power to expel an inmate for a violation of the by-laws, without the authority of the trustees, or at least, of those constituting the executive committee.

THIS was an application for a peremptory mandamus, against the trustees of the Sailors' Snug Harbor, to restore the relator to his position as an inmate of that institution, with the privilege of all its franchises, from which he had been turned out by Thos. Mellville, the governor and administrator of the Harbor, in the month of September, 1868.

The relator filed a petition, and accompanied it with an affidavit relating the facts of his case. By this petition it appeared that the relator had been an inmate and beneficiary of the Harbor, an asylum for aged and invalid seamen, established under the will of Robert Richard Randall, by which will the testator bestowed twenty-two acres of land in the city of New York, for the purpose of founding a charitable institution for the support of aged, decrepid and worn out seamen. The board of trustees consists of the mayor, recorder, the president of the chamber of com-

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merce, the president and vice president of the marine society, the oldest episcopalian minister and the oldest presbyterian minister in New York, with their successors in office, perpetually. The petition stated that the governor had turned the relator out of the Harbor by two policemen, and had refused to readmit him, because he, the relator, had defended himself when assaulted by Henry A. Curtis, a steward.

The court, on filing the petition *ex parte*, ordered an alternative mandamus to issue to restore the relator, or to show cause. The respondents showed cause, alleging that on the 11th of September, 1868, the relator had in the dining hall of the institution violently assaulted the steward, Curtis, by clinching him around the body, and tearing his vest and shirt, and that he had declared then and there, in a loud voice, that certain officers of the institution, whom he named, were a set of liars, thieves and swindlers.

On the coming in of this answer, the relator filed an affidavit alleging that he was assaulted first at the table by Curtis. The respondents filed three affidavits, setting forth that the relator on other occasions had been guilty of gross acts of disobedience and disturbance while an inmate of the Harbor, and had twice before been convicted of assaults and batteries.

Alanson Nash, for the relator.

J. L. Riker and *William Fullerton*, for the defendants.

SUTHERLAND, J. By the will of the founder of the charity, the testamentary gift was to be used and applied for supporting the asylum or hospital "in such manner as the testamentary trustees or a majority of them may, from time to time, or their successors in office may, from time to time, *direct*."

By the act incorporating the trustees, they have power

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to make all proper and necessary rules and regulations for the government of the corporation, not inconsistent with the constitution and laws of the United States, and of this State.

The 7th article or section of the 11th subdivision of the by-laws declares, among other things, that any inmate who shall be convicted "of leaving the premises, without permission from the governor, or one of the assistants, shall forfeit the benefits of the institution, and be expelled from it."

By the 13th section or article of the same subdivision of the by-laws, "inmates are strictly forbidden to indulge in contention, or boisterous and disorderly conversation *at the table*, and are solemnly enjoined to demean themselves in a decorous manner, as becoming aged and honest seamen."

The 19th section or article of the same subdivision of the by-laws forbids any inmate leaving the institution without permission of the governor.

The return to the alternative writ of mandamus in this case alleges that the relator, an inmate of the asylum or hospital, was, on the 11th of September, guilty of improper and disorderly conduct and conversation at the breakfast table, by making grossly improper remarks to the steward, which are set out, and by violently assaulting the steward.

The return further states that the steward reported this improper conduct to the governor of the institution, who afterwards dismissed the relator from the institution by the *direction of the executive committee thereof*.

The return further states that the relator was notified of the time of the examination of his conduct by the executive committee; that the relator did not attend, alleging that he had to attend in New York city as a witness, under a subpoena; and the return further alleges that the relator

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was not in fact then under a subpoena to attend as a witness as he alleged.

The return refers to certain affidavits which were handed up with it, as verifying the facts stated in the return.

Since these papers were submitted, the counsel of the relator has handed me an affidavit of the relator, verified on November 30, alleging that on September 11, on the occasion referred to in the return, the steward first assaulted him, and that in the affray he did nothing more than was necessary to protect himself from, and get rid of, the assault of the steward. The relator does not deny in this affidavit that he made use of the language charged in the return, on this occasion.

The by-laws, which have been specified, appear to me to be reasonable and proper and valid. They appear to me to be authorized by the act of incorporation, and to be consistent with the administration of the charity which the founder of it had in view; but I am not willing to hold that the governor has the power to expel an inmate for a violation of either of the by-laws referred to, without the authority of the trustees, or at least of the trustees constituting the executive committee.

Probably intermediate the periods of the meetings of the trustees, the executive committee can act for them, in examining a charge of an alleged violation of a by-law.

The accused inmate should have reasonable notice of such examination, and an opportunity of being heard, of *exculpating* himself, and of disproving the charge.

Nor am I willing to concede that the action and proceeding of the trustees, or of the executive committee, in investigating such a charge, is beyond the control of, or a review by, this court.

In this case, I am satisfied from the return and all the affidavits and papers submitted, that the allegations in the return as to the conduct and conversation of the relator on the 11th of September are substantially true; that the

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governor did not undertake to expel the relator without the direction of the trustees, or of the executive committee; that the governor reported the alleged misconduct and violation of the by-laws on the part of the relator to the trustees or executive committee, who examined into the truth of the charge, and directed the governor to expel the relator; and that the relator had reasonable notice of the time and place of such examination, but absented himself therefrom without a reasonable excuse.

Though I have been somewhat embarrassed in disposing of this case, from the manner in which the papers, affidavits, &c., have been submitted, yet I do not see how I can dispose of it otherwise than by dismissing the alternative writ, and denying the motion for the peremptory writ without costs.

Order accordingly.

[NEW YORK SPECIAL TERM, December 7, 1868. *Sutherland*, Justice.]

 WHITNEY vs. TAYLOR.

A warranty that a span of ponies are all right for livery purposes cannot, it *seems*, be construed into a special undertaking that they are not *with foal*. One of them being *with foal*, is not an unsoundness within the meaning of a general warranty.

In case of fraud, it *seems*, an action would lie for special damages.

If, however, the warranty is special, the damages are necessarily special, and must be estimated by the jury, and not by the opinion of witnesses.

There being no market value for pregnant mares, for *livery purposes*, a witness cannot be asked the value of a mare in that condition *for livery purposes*, and her value if not in that condition, and then give his opinion as to the difference in value.

A PPEAL from a judgment of the county court of Herkimer county, after a motion for a new trial had been denied.

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The action was originally tried in a justice's court, and resulted in a verdict for the defendant. The plaintiff appealed to the county court, and upon a trial in that court obtained a verdict for \$50 damages.

The case proved, showed that the plaintiff and one Henry Whitney were in the livery business, and the defendant sold them a span of ponies, warranting that they were all right in every shape, single or double, for the livery business. It turned out that one of them was with foal, in consequence of which she became less valuable for the livery business, and the plaintiff traded her off and got another mare. It was also proved that this mare was not as good a match as the one in question.

The following question was asked of the plaintiff, who was a witness on the stand. "How much less was the mare worth for livery purposes, as she was with foal, than what she would have been if as warranted or represented?" Objected to by the defendant on the grounds: "(1.) That it was not the correct manner of estimating damages. (2.) The question should have been, what would the mare be worth if she had been as recommended, and what is she worth as she proved to be. (3.) No warranty has been proved against the mare being with foal. A general warranty does not cover the defect complained of." Objection overruled, and the defendant in due time excepted to the ruling of the court thereon, and the witness answered as follows: "She was worth \$50 less."

The plaintiff obtained a verdict for \$50, and the defendant appealed from the judgment entered thereon.

S. S. Morgan, for the appellant. I. There is no evidence, in the case, of a warranty, except that the mares were all *right*. There is no warranty against the mares' being with foal, and yet the evidence upon the subject of damage is mainly confined to the damage in consequence of the off mare being with foal. If it is possible to settle any ques-

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tion in this State beyond controversy, it is now settled that a witness cannot give his opinion as to the gross amount of damage. He cannot be permitted to state in gross the amount of the injury, or the difference in value which the plaintiff claims to recover. 1st. Because, in doing so, he must assume what is the legal rule or measure of damages, which is a question of law, to be decided only by the court. 2d. Because in doing so the witness usurps the functions of the jury, the amount of damages being a question *exclusively* for their judgment. (*Van Deusen v. Young*, 29 *N. Y. Rep.* 9, 26, 36. *Decker v. Myers*, 31 *How.* 372, 376. *Benkard v. Babcock*, 27 *How. Pr.* 392, 405. *Armstrong v. Smith*, 44 *Barb.* 120, and cases there cited.)

Thomas Richardson, for the respondent. I. There was no error in the admission of evidence. 1. The objection to the question put to M. P. Whitney, and the same question to H. P. Whitney, was properly overruled. (a.) It was objected to on three grounds, the second and third of which are entirely unworthy of notice. It is difficult to understand what is meant by the first objection. The most reasonable construction is that it is simply introductory to the second and third objections; and if so, it must fall with them. But if it should be interpreted as an objection to the assumed *measure* of damages, then we say: (b.) That the mares were warranted as fit for a special purpose, to wit, for livery purposes, and the measure of damages was correct. (*Passinger v. Thorburn*, 35 *Barb.* 17; *affirmed*, 34 *N. Y. Rep.* 684. 16 *id.* 489. 5 *Bing.* 544.)

II. The objection to the question put to the same witnesses was properly overruled. The same objections were made as to the question just discussed; and it is submitted that there needs no argument to show the objections utterly futile.

III. The refusals to charge as requested were properly made. 1. The first proposition was that the evidence did

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not show a warranty against the mares being with foal. It was a question of intent and of fact for the jury, and was properly submitted to them. The warranty claimed, was that the mares were *all right*, &c.; not that they were simply *sound*. Any infirmity which renders the animal less fit for present service, has been held to be unsoundness. (*Hill. on Sales*, p. 281, *n.* and cases cited. *Chitty on Cont.* 407, and cases cited.) In this case the warranty was that she was "all right," &c. As before stated, it was a question for the jury, and they have found against the defendant.

MORGAN, J. The statement of the case shows clearly the nature of the questions to be decided upon this appeal. The first question which I shall examine is, whether the warranty is general or special. If it is a general warranty, then the fact that the mare was with foal, was not a breach of it. It was in no sense of the word to be regarded as an unsoundness, although it rendered the mare less valuable for livery purposes, for a time at least. It may be a question what was intended by the words that the "ponies are all right, every way, for livery purposes." No one would suppose that any thing else was intended except that they were sound. What is implied more than this is general praise, which does not lay the foundation for an action either for fraud or warranty.

If the defendant knew that the mare was with foal, and purposely concealed that fact from the plaintiff, although it would not be regarded as unsoundness, still, if any damages had ensued, it would constitute an actionable fraud. But unless the defendant knew the fact, it can hardly be supposed that he intended to warrant specially against the mare's being in that condition, or that the plaintiff so understood it. There was a good deal of discussion and some difference of opinion in *Passinger v. Thorburn*, (34

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N. Y. Rep. 634.) whether the case showed that the warranty was general or special; but a majority of the court having come to the conclusion that the warranty was special, the plaintiff was allowed to recover his consequential damages. My opinion is, that we ought not to extend the rule to other and doubtful cases. In the absence of fraud, I do not think a warranty of the kind here proved can be construed into a special undertaking that a mare is not with foal. Her being with foal, certainly is not an unsoundness, within the meaning of a general warranty.

But assuming that it was within the meaning of the warranty, the question proposed to the witness was inadmissible to prove the damages. There was no market value for pregnant mares for livery purposes, and the opinion of the witness could not be received as in the case where an article has a known or market value.

The question assumes that the witness knows how much was the value of the mare for livery purposes. It also assumes that he knows how much she would have been worth if she had not been with foal, whereas there was no evidence to show that he knew either fact. How, then, could he compute the damages? The farthest the authorities have gone, would only allow the witness to give the difference in the value when he had qualified himself by showing that he was acquainted with the value of the article as warranted, and with its value as diminished on account of the defect complained of. That difference the witness may call "dollars and cents," or "damages," but before he can answer in either form, he must show that he is qualified to answer it as a fact and not as mere speculation.

As there was no known or market value for pregnant mares for livery purposes, it is evident that the plaintiff resorted to an improper mode of ascertaining damages. The damages in such a case are necessarily special, and

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limited to the actual loss sustained. So far as they depend upon mere estimate, they must be fixed by the jury, and not by the witnesses. (*Morehouse v. Mathews*, 2 N. Y. Rep. 514.) The particular items of damages should be proved, and the whole together left to the jury to assess according to their own judgment. From an examination of the testimony in this case, it is impossible to determine with any accuracy what particular damages the plaintiff sustained in consequence of the mare's being with foal. One way to arrive at the solution of the question, would have been for the plaintiff to show how much the mare was worth, not for livery purposes, but for general purposes, and how much she would have been worth if she had been in a condition to put in the livery business, single or double.

It is quite evident that the witness did not make this difference in value the rule of damages. He was not inquired of as to her real value. For aught we know, she may have had a much larger value on account of her being with foal than she would have for livery purposes; and her place in the livery of the plaintiff may have been supplied for a less sum than her real value.

In my opinion, the evidence objected to was improper and inadmissible to prove damages. If it is therefore conceded that the warranty was special so as to support an action for the special damages, the court erred in allowing the witness to give his opinion as to the amount, without showing what the mare would have been worth for livery purposes if she had not been with foal, and what was her real value, being with foal, so that the court could see that his estimate of the damages was no more than the difference if the witness had expressed it in dollars and cents. The judgment should be reversed and a new trial granted, costs to abide the event.

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MULLIN, J., read an opinion coming to the same result.

FOSTER, J., dissented.

Judgment reversed, and a new trial granted, costs to abide the event.

[ONONDAGA GENERAL TERM, June 30, 1868. *Foster, Mullin and Morgan, Justices.*]

HAMILTON vs. GRIDLEY.

If the vendee, subsequently to the execution of a written contract, which is declared void by the statutes of Pennsylvania, for being made on Sunday, demand, on a week day, a conveyance of the property and receives the same, promising to pay the purchase price, a new and valid contract arises between the parties, which entitles the vendor to an action to enforce payment.

And where the plaintiff, in such a case, counted upon the contract as being in writing, but was allowed on the trial, without objection, to prove the subsequent conveyance and a parol promise to pay; *Held* that the variance might be disregarded under the provisions of the Code of Procedure.

APPEAL from a judgment entered upon the report of a referee, in favor of the plaintiff, for \$1329.64 damages and costs.

The complaint alleged that on the 20th of August, 1865, the defendant entered into an agreement, in consideration of certain undertakings and agreements on the part of the plaintiff therein expressed, to pay him, the plaintiff, the sum of \$1000, as follows: \$500 on or before the expiration of 30 days; the remainder on or before the expiration of 60 days; all of which would appear more fully by reference to said agreement in the plaintiff's hands, to which the plaintiff referred.

The defendant, after denying generally the allegations of the complaint, averred, among other defenses not necessary to notice, that the contract in question was made in Pennsylvania, and that it was made on Sunday, and was therefore void by the laws of Pennsylvania.

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The following facts, among others, were found by the referee: (1.) On the 27th of August, 1865, the parties made a written agreement, wherein the plaintiff agreed to convey to the defendant, on or before the 26th of October, 1865, an undivided one thirty-second interest in the farm, and 28 leasehold making interest in well No. 16 on Pit-hole creek, Pennsylvania; and in consideration thereof, the defendant agreed to pay the plaintiff \$1000, as follows: \$500 on or before 30 days from the 26th of August, 1865, and the remaining \$500 on or before 60 days thereafter. That the 27th of August, 1865, was Sunday, and by the laws of Pennsylvania, any person "who shall do or perform any worldly business or employment on the Lord's day, shall be subject to a fine," &c. That subsequently, on the 1st of February, 1866, the defendant requested the plaintiff to fulfill his contract, and the plaintiff thereupon made a conveyance of his interest in said land as described in the contract, and delivered it to the defendant, who accepted the same and promised to pay the \$1000 in consideration thereof.

The referee found, as a conclusion of law, that the plaintiff was entitled to recover.

The right of the plaintiff to recover was resisted by the defendant by a motion to nonsuit the plaintiff. The defendant also took certain exceptions to the rulings of the referee. The referee found, as an independent proposition, that the subsequent acts of the parties constituted an affirmation and re-execution of the contract, which gave it the same effect as though originally valid. To this decision the defendant excepted.

The defendant's counsel asked the referee to rule that as the action was predicated on the original contract, it could not be sustained on the theory of a new contract, on account of a variance between the proof and complaint. The referee refused to rule this point in favor of the defendant, and there was an exception.

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Wm. J. Wallace, for the appellant. I. The contract being for the sale and purchase of land in Pennsylvania, its validity is to be determined by the *lex rei sitæ*, or law of that state. So the referee properly decided; and he also found, both as matter of law and fact, that according to Pennsylvania law the contract was illegal and void. So far the referee was clearly right. (6 *Watts*, 231. 4 *Serg. & Rawle*, 150. 27 *Penn. R.* 90.)

II. A contract which is contrary to public law and policy, and void on that ground, is entirely incapable of ratification. It is absolutely impossible to give such a contract life or vitality. The parties may carry such a contract into actual execution by their own acts, and when they do so they can no more maintain a suit to rescind it than they can to enforce its performance before the actual execution of its provisions. The law will have nothing to do with it. The maxims, "*in defendentis pari est conditio, delicto potior*," and "*ex dolo malo non oritur actio*," apply to such a case. Regarding this action as upon the contract, these maxims and the settled rule of law are absolutely fatal to it. (*Broom's Legal Max.* 565, 572, 576. *Nellis v. Clark*, 20 *Wend.* 24. *Story's Eq. Jur.* 360. 16 *N. Y. Rep.* 508. 11 *Ala. R.* 885. 14 *N. H. Rep.* 133. 9 *Ala. R.* 198.)

III. The question as to what the action is founded upon can only be answered by looking at the complaint. It is distinctly and precisely on the illegal contract. It cannot be maintained, unless it be adjudged that a suit will lie on the contract. Moreover, the decision of the referee is founded on the contract, and purports to enforce one of its unexecuted provisions. He holds, as matter of law, that the contract was capable of ratification, and was ratified. This was erroneous, because the law will not thus frustrate its own policy. A contract made on Sunday, but ratified on Monday, is still a contract made on Sunday, and is still forbidden and unlawful. To say that a contract

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is good by ratification, is simply to say that it is good and valid. (*Cases supra.*)

IV. Grant that the plaintiff might have amended, with a view to recover upon another and new contract; he did not even propose to do this.

V. If the transaction of Feb. 1st, 1866, might be open to the inquiry whether a new and original agreement was not then made, such an inquiry can only be entertained under a complaint alleging such an agreement, and seeking to recover upon it. Doubtless this question of fact (for such it is) might have been reached by an amendment. But the plaintiff did not, and would not, proceed in this manner. The issue was formed distinctly by the complaint setting forth a written contract, alleging performance on his part, and claiming performance from the defendant, and by an answer averring that such a contract was made on Sunday, and was illegal and void, and that issue being explicitly found in the defendant's favor, the judgment against him is erroneous. On this appeal an amendment cannot be allowed which was not even offered at the trial. If, indeed, there is a question whether the defendant did not make some new and lawful agreement by which he is bound, he is entitled at least to a trial of that question, because it has not yet been tried, and could not be as the issue was formed.

G. N. Kennedy, for the respondent. I. The execution, delivery and acceptance of the deed by the defendant, subsequent to the execution of the contract, amounted to an affirmance or re-execution of it, and rendered the same binding and obligatory upon the parties.

By the agreement the payment of the money was made a condition precedent to the execution of the deed. The statute of Vermont provides, like the statute of Pennsylvania, that all contracts made on Sunday shall be void. (*Compiled Statutes of Vermont*, 502, § 1.)

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The question as to the effect of acts amounting to a ratification of such a contract, subsequently, was considered and decided in the case of *Adams v. Gray*, (4 Wash. 358,) where the court, among other things, hold "that contracts made on Sunday are not tainted *with any general illegality*, but are illegal only as to the time they are entered into," &c. "And in all cases of contract entered into on Sunday, if either party has done any thing in execution of the contract, it is competent for him, on another day, to demand of the other party a return of the thing delivered, and if the other party refuse, the original contract becomes thereby affirmed, and the same rights and liabilities are induced as if the contract had been made on the latter day." Again, the court say this is an indispensable exception to the general rule in regard to illegal contracts, in order to secure parties from frauds and overreaching. (*Gross v. Whitney*, 1 Will. 272.)

Under the statute of New Hampshire, which is somewhat similar to that of Pennsylvania, it was held in *Clough v. Davis* (9 N. H. Rep. 500) that a note made on Sunday was void, but that a subsequent promise to pay, by the maker, was a ratification of the note, and the payee was entitled to recover thereon. A promissory note made on Sunday is good in the hands of a bona fide holder. (*State Bank v. Thompson*, 42 N. H. Rep. 369.) A promissory note made on Sunday is void where no subsequent ratification is shown. (*Bodey v. McAllister*, 13 Ind. R. 565. *Statutes of Indiana*, vol. 2, p. 481. *Sherman v. Sherman*, 27 Penn. R. 90.) A bond executed on Sunday is evidence as an admission of a debt. (*Webber v. Samuel*, 7 Barr, 499.) A bond executed on Sunday and delivered on Monday, is good. (2 *id.* 448.)

II. The bill of exceptions shows that a deed of the land was duly executed and delivered by the plaintiff to the defendant, and the defendant, on the 18th day of February, 1866, in consideration thereof, promised to pay the

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plaintiff the \$1000 as provided in the contract. On these facts the plaintiff was entitled to recover, without reference to the precise nature of the pleadings. (*Code*, §§ 169, 170.)

III. This being a bill of exceptions, it is presumed that there was evidence sufficient to authorize the finding of facts by the referee.

MORGAN, J. It is conceded that by the laws of Pennsylvania, and under the decisions of the courts in that state, the original agreement between the parties was void, and could not be enforced, it having been executed on Sunday. But the defendant resists the recovery in this action upon the grounds, (1.) That such a contract is incapable of ratification by a subsequent parol agreement to perform it; and (2.) If it is capable of ratification, then the complaint should count upon the new agreement, and not upon the original contract.

It is certain that the recovery in this case depends upon the transaction of the 1st of February, 1866, when the defendant required and obtained from the plaintiff a conveyance of the property, and actually agreed to pay him for it \$1000, the consideration price mentioned in the original written contract. This was not in strict compliance with the written contract, as the time had already elapsed when the conveyance was to be executed and the consideration paid.

But, without doubt, it was competent for the parties to waive these conditions, and enter into a new arrangement, which would impose upon both parties the obligations assumed by them in the original contract. This was effectually accomplished so as to bind the defendant, when he afterwards accepted the conveyance and assumed to pay the consideration.

In *Grass v. Whitney*, (27 *Vt. Rep.* 272,) it was ruled that although a note is made and delivered on Sunday, and

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therefore void; yet a promise to pay it on a subsequent day is good, and may be enforced. (*And see Adams v. Gay*, 19 *Vt. Rep.* 358.)

Such a contract, though made on Sunday, is not void at common law, (*Sherman v. Sherman*, 27 *Penn. Rep.* 90;) and being made void by operation of the statute, it is capable of subsequent ratification. Under the English statute, which is similar to the Pennsylvania statute, it was held in *Williams v. Paul*, (6 *Bing.* 653,) that where the defendant, who had bought some cattle of the plaintiff, a drover, on a Sunday, kept them and afterwards promised payment, he was liable on a *quantum meruit*.

The rule is laid down in the elementary books as follows: "If the owner subsequently to the void sale demands on a week day either the goods or the price, and the intended purchaser then promises to pay for them, a new and valid contract of purchase and sale arises between the parties, which may be enforced by action." (*Addison on Cont.* 112.)

The only other question raised by the defendant's exception which deserves attention is, that the action is founded upon the original void contract and not upon the subsequent agreement to carry it into effect.

By referring to the printed case it will be seen that the plaintiff proved, without objection, the original contract purporting to be made on the 25th of August instead of Sunday the 26th, and followed it up by reading in evidence the conveyance which that contract called for, except that it bore date February 1, 1866; and then the plaintiff testified, without objection, to the subsequent agreement on the part of the defendant to pay the \$1000 on the first of April, 1865.

By the provision of the Code of Procedure, sections 169, 171, 172, and 173, variances between the allegations of the complaint and the evidence are of no great importance; and the objection, to be available, should be distinctly made at the trial. Even under the former system of plead-

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ings and practice, it was decided that the proper time to object to evidence on account of variance, is when it is offered on the trial. If the question had been raised upon the trial, when the evidence was offered to prove a subsequent agreement, not set out in the complaint, similar to the original contract, no doubt it would have been competent for the referee either to allow an amendment of the complaint, or if his power to do that is denied, he could have adjourned the trial to give the plaintiff an opportunity to apply to the court for that purpose.

Now I think when there is no pretense that the defendant was misled to his prejudice, the referee was right in disregarding the variance, and if necessary the court will, even after judgment, conform the pleadings to the facts proved.

The objection, in this case, was not to the evidence of a new agreement, substantially repeating the original agreement set out in the complaint, but after the evidence was all in, the defendant objected that no recovery could be had upon the new agreement, it not having been counted on in the complaint. In my opinion this objection came too late. To be available at that stage of the action, it must appear that the cause of action is unproved in its entire scope and meaning. (*Code of Procedure*, § 171.) This is not such a case.

As the final conclusion of the referee was right, it is not important that we should hold, with him, that the subsequent transaction between the parties constituted an affirmation or a re-execution of the original contract so as to make the original contract valid. It is enough to say that the new agreement was valid and binding upon the defendant, and that no objection was taken to proof of it on the trial. Both agreements were substantially the same, and if the plaintiff had not substantially averred that it was in writing, there would be no plausible grounds for saying that it was even a case of variance.

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The motion for a new trial should be denied, and the judgment affirmed.

FOSTER, J., concurred.

MULLIN, J., dissented, on the ground that the action should have been upon the subsequent agreement.

Judgment affirmed.

[ONONDAGA GENERAL TERM, June 30, 1868. *Foster, Mullin and Morgan, Justices.*]

MARY FLYNN vs. MILLIE D. POWERS.

The contracts of an infant are voidable only, and not void. They are subsisting liabilities, requiring, however, ratification after the infant becomes twenty-one, in order to be enforced.

An infant took a conveyance of land on which there was a subsisting mortgage, which she assumed and agreed to pay, as a part of the purchase money. Subsequently, while still an infant, she sold the land to a third person, who agreed to pay the mortgage. After she became of age, the mortgage was foreclosed, and she being made a party to the foreclosure suit, appeared by attorney, but put in no answer, and judgment was entered against her, as if she had been an adult. *Held* that, having been silent when she might have spoken, and having suffered the complaint in the foreclosure suit to be taken as confessed against her, the defendant determined that the act done by her in infancy should stand; and that after having taken her chance for a surplus, to herself or her grantee, as if the conveyances were good, it was too late for her to set up the defense of infancy, to escape the payment of a deficiency.

APPEAL from a judgment entered at a special term, on a trial by the court without a jury. The action was brought to recover the amount of a deficiency arising from a foreclosure sale.

On the 20th of February, 1855, E. A. Walsh, being the owner of a lot of land in the city of New York, gave a mortgage thereon, accompanied by a bond, to one White-

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head, to secure the payment of \$3596. On the 20th of June, 1856, Walsh conveyed the property to the defendant, for the consideration of \$9300, the grantee in such deed assuming and agreeing to pay the mortgage. At the time she took this conveyance from Walsh, the defendant was only nineteen or twenty years of age. On the 21st of January, 1857, before she became of age, the defendant conveyed the land to one Brouwer for \$12,000. Brouwer also agreed to pay such mortgage. On the 7th of June, 1860, Whitehead commenced an action in the Supreme Court to foreclose the mortgage, and made the defendant a party, by serving her with a summons and complaint and notice of the suit. She appeared in that action, by her attorney, but did not answer, and a judgment of foreclosure was entered July 20, 1860. The property was sold, under said judgment, and on the 10th of September, 1860, a judgment was entered against Walsh, the mortgagor, for the deficiency, \$1504.04. In December, 1866, Walsh paid that judgment, and assigned his claim against the defendant to the plaintiff in this action.

During all these transactions the defendant was, and still is, a married woman. She is now the owner of several pieces of real estate, in her own right, and has a separate estate.

The cause was tried by the court without a jury, and a judgment rendered for the plaintiff, against the defendant, charging her separate estate with the amount of the judgment given for the deficiency.

The following opinion was rendered by the justice at special term:

TAPPAN, J. "The later decisions of the Court of Appeals appear to meet and govern the first question, in this case. They will be found in *Owen v. Cawley*, (36 N. Y. Rep. 600,) and in *Ballin et al., ex'rs, v. Dillaye*, (35 How. Pr. 216.) In the latter case, quoting the chancellor in *Gard-*

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ner v. Gardner, (7 Paige, 112,) the court says: "The wife may have a separate estate of her own, which estate is chargeable in equity for any debt she may contract on the credit or for the use of such estate;" also citing *North American Coal Co. v. Dyett*, (Id. 9;) *Yale v. Dederer*, (18 N. Y. Rep. 265;) and *White v. McNett*, (33 id. 371.)

In the case under consideration, the defendant had a separate estate. The obligation which she took upon herself was for the benefit of her separate estate; and indeed in this case that obligation enabled her to acquire a separate estate; for how can it be said that a debt contracted upon the purchase of property which a purchaser takes into possession and enjoys, and disposes of at an apparent profit, is not a debt contracted for the benefit of the purchaser's estate. Her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit, to any extent. A lien does not exist for her engagements at large, but may be deduced from an express or implied agreement to that effect, on her part, or from some equivalent obligation resulting from her act by operation of law.

In this case, Mrs. Powers, the defendant, in conveying the premises to Brouwer, made the conveyance subject to the two existing mortgages, the payment of which Brouwer assumed as a part of the consideration money, and Mrs. Powers has therefore a right of action against him, or his representatives, to make good the deficiency in question.

As to the question of infancy, I will just state the dates of the several transactions.

The conveyance to the defendant is dated June 20, 1856, acknowledged August 5, 1856, recorded October 23, 1856. The conveyance by the defendant to John Brouwer is dated January 21, 1857, acknowledged March 21, 1857, recorded April 2, 1857. In June, 1860, the defendant herein was personally served with a summons and notice of the object of the action, and appeared by attorney, in the foreclosure

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suit. A sale was had therein, August 14, 1860, and a judgment against Walsh, for the deficiency, docketed September 8, 1860, for \$1504, and on the 19th of December, 1866, this deficiency appears to have been settled by the plaintiff in this action, for and on account of Walsh, who, on that day, assigned to the plaintiff herein his claim against the defendant herein.

I do not consider the proof conclusive as to the defendant's infancy. The witness on that point is the defendant's mother. She says: "I think the defendant was born in 1837, and I have always kept her birth day 31st March. I had a record, but it was destroyed by fire, when I was burnt out, a year or two after my husband's death. He has been dead twenty-five or twenty-six years; Millie (the defendant) was my fourth child; she was sixteen years of age, entering her seventeenth year, when married, which was January 18; but don't recollect the year. I had five children. The second child was born in 1832, in the cholera season; that is what makes me recollect." I have, with some doubt, however, given the defendant the benefit of a finding that she was not of the age of twenty-one years.

But this question of fact is not so important if we refer to the subsequent acts of the defendant in conveying the premises with warranty of title, and taking the purchaser's covenant to assume the mortgage, and to save the defendant harmless; also the appearance of the defendant by attorney, in the foreclosure suit, after being personally served with the summons and notice of the object of the action, and no question of infancy being raised. In all this there is sufficient proof of affirmance. Moreover, there should be a restitution by the defendant, of the consideration received, in order to avoid the liability entailed by the contract. The estate, and the proceeds thereof, cannot be retained without performance of the obligation sought to be enforced. This is the uniform rule. (*Henry*

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v. *Root*, 33 *N. Y. Rep.* 531, and cases cited. *Lynde v. Budd*, 2 *Paige*, 191. *Kitchen v. Lee*, 11 *id.* 107.)

Judgment should be entered for the plaintiff, according to the prayer of the complaint."

Judgment being entered accordingly, the defendant appealed.

Ira D. Warren, for the appellant, insisted that the plaintiff was not entitled to recover, on the following grounds:

First. Because, at the time of this transaction, the defendant was a married woman.

Second. Because, at the time she took her deed and entered into the covenant to pay the mortgage upon the premises conveyed, and at the time she sold the property, the defendant was an infant under the age of twenty-one years.

A. Parsons, for the respondent.

By the Court, J. F. BARNARD, J. It is now established that the contracts of an infant are voidable only, and not void, and are subsisting liabilities, requiring, however, ratification after such infant becomes twenty-one, to be enforced. (*Henry v. Root*, 33 *N. Y. Rep.* 526.) The defendant, while an infant, took a conveyance from Edward A. Walsh, of certain lands in New York, on which there was, at the time of the conveyance by Walsh to her, a mortgage given by Walsh to Samuel Whitehead. This mortgage was deducted from the purchase price of the land, and the defendant, as part of the price, agreed to pay Whitehead the amount thereof. Subsequently, and while still under age, the defendant conveyed the premises, at a considerably advanced price, to John Brouwer, deducted the same mortgage from the consideration, and Brouwer, in like manner as she had done, agreed to pay such mortgage. The mortgage was not paid, and White-

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head foreclosed. Walsh, the defendant, and Brouwer were defendants in the foreclosure suit. The defendant was then of full age. She appeared by attorney, but put in no answer. Judgment was entered in the foreclosure suit as if she had been an adult during the whole transaction. She might have spoken; she was silent, and permitted the rights of the parties to be passed upon and determined as if she was a person capable of conveying and receiving a conveyance. If there had been a surplus upon the foreclosure sale, the defendant's grantee would have been entitled to it.

If she then had repudiated her purchase from Walsh, and her sale to Brouwer, all the parties were before the court, and Walsh could have been protected. By her suffering the foreclosure complaint to be taken as confessed by her, she determined that the act done by her in infancy should stand. She and Brouwer were made defendants, as grantees subsequently to Whitehead's mortgage.

It is too late, after she takes her chance for the surplus, or permits her grantee to have a right to the surplus, as if the conveyances were good, to set up this defense of infancy to escape the payment of a deficiency.

The judgment should be affirmed, with costs.

Lott, P. J., (dissenting.) The learned judge who tried this action without a jury has found, as a fact, that the defendant was an infant at the time she received the deed containing the assumption and agreement on her part to pay the amount secured by the mortgage in question, and that she had not attained full age at the time of the conveyance subsequently executed and delivered by her to John Brouwer, of the property covered by the mortgage, and referred to in his findings of fact. Consequently, that conveyance cannot operate as an affirmation or satisfaction of the original assumption and agreement; and I do not find any promise, declaration or acts by her after

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she became of full age, by which she agreed to ratify that contract, or which in any manner import a recognition or confirmation of it. The naked fact, found by the judge, that she was made a party to the action for the foreclosure of the mortgage, and appeared therein by her attorney; that a sale was had under the judgment therein, for a price insufficient to pay the amount due thereon; and that the plaintiff's assignor subsequently paid the deficiency or balance that remained due, in pursuance of the direction and requirement of that judgment, is not sufficient. It does not appear that any answer was put in for her, or that any act whatever, except such appearance, was done by her or her attorney, in that action. Nor is it found that the fact of such assumption or agreement was alleged in the complaint; and as the liability of her grantor to satisfy and discharge the deficiency arose out of his personal obligation to pay the mortgage, there was no necessity of setting out any of the contents of the deed made by him to her, and it will not be assumed that they were. There was therefore not even an admission by the defendant, assuming that she suffered judgment to pass by default, of the execution and delivery of that deed to her.

Under such circumstances, the defendant was not legally liable on her promise.

The judgment against her should therefore be reversed, and a new trial ordered; costs to abide the event.

Judgment affirmed.

[KING'S GENERAL TERM, December 14, 1868. *Lott, J. F. Barnard, Gilbert and Tappan, Justices.*]

PHELPS *vs.* PLATT and others.

An order made in an action brought by the plaintiff as a judgment and execution creditor, to set aside an alleged transfer of partnership property, for fraud, directed that the defendant produce for the inspection, examination and copying of the plaintiff, *all* the books and papers of the defendant's intestate containing partnership accounts, and also *all* papers, letters, &c., made or signed by the intestate, after a certain date. The affidavit for the discovery neither specified, nor referred to, any particular entry, or to any particular paper; nor did it state any fact or circumstance to show the materiality or necessity of an inspection of all the books and papers. *Held* that the order was too sweeping and general, and the same was reversed.

Held, also, that the plaintiff not being the representative of the deceased partner, but making such decedent's representatives parties defendants, the order could not be justified on the ground that a partner, or his representative, has a right to an inspection of all the copartnership books and papers.

The affidavit for a production and discovery should be made by the plaintiff; or, if made by the attorney, some reason should be shown for his making it.

APPEAL from an order for the production and discovery of books and papers, in an action brought by the plaintiff, as a judgment and execution creditor, to set aside a transfer of property, for fraud.

By the Court, SUTHERLAND, J. I think the order appealed from should be reversed, with costs. The order is too sweeping and general. It is, that the defendant George W. Platt produce for the inspection, examination and copying of the plaintiff, *all* the books and papers containing the partnership accounts, and also *all* papers, letters, &c., made or signed by Nathan C. Platt, after a certain date. It is evident from the pleadings and affidavit on which the order was made, that the purpose of the plaintiff or of his attorney was to discover a cause of action, not to discover particular entries or papers which the plaintiff or his attorney had reasonable grounds for thinking were existing within the defendant Geo. W. Platt's control, to show the fraud alleged in the complaint. The affidavit for the discovery neither specifies, nor refers to, any particular entry, or to any particular paper, nor does it

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state any fact, or circumstance, to show the materiality or necessity of an inspection of all these books and papers.

The action is brought by the plaintiff as a judgment and execution creditor, to set aside an alleged transfer of property, for fraud. The purpose of the discovery proceeding was, to have all the books, papers, &c., produced, so that the plaintiff or his attorney might see whether he could not find some entry, so far tending to show the fraud as to authorize proceeding to trial. I think this was asking far more than could be legitimately granted.

The plaintiff is not the representative of Nathan C. Platt, the deceased partner. He makes the representatives of Nathan C. Platt parties defendants. The order therefore cannot be justified on the ground that a partner, or his representative, has a right to an inspection of all the partnership books and papers.

It is not alleged in the complaint that the real estate described therein was partnership property. It would be quite consistent with the complaint to infer that it was the individual property of Nathan C. Platt.

In no view of the complaint can it be said that the action is for the adjustment or settlement of partnership affairs or accounts.

In addition to what has been said, I would say that the affidavit for the discovery should have been made by the plaintiff, or some reason shown for the attorney making it.

I repeat, that I think the order should be reversed, with costs.

[NEW YORK GENERAL TERM, June 7, 1869. *Geo. G. Barnard, Cardozo and Sutherland, Justices.*]

THE ARCTIC FIRE INSURANCE COMPANY *vs.* JEREMIAH AUSTIN, President of the Albany and Canal Line of Tow Boats.

A tow boat company engaged in the business of towing is not, for such purposes a common carrier, nor subject to the liabilities assumed by such engagements.

The proprietors of a tow boat so engaged are liable for negligence in performing the special duty they have undertaken, and not otherwise.

The words "at the risk of the master or owners," in a permit for the towing of a boat, do not excuse the proprietor of the tow boat from liability for negligence in performing his contract.

The master of a tow boat is not chargeable with negligence because the captain of the boat towed fails to provide a watch or lights on board his boat.

The captain of a tow boat has not the entire charge and control of the boats he takes in tow. Although the latter are attached to his vessel, the captains and crew are on board, and are required to use care and caution on their part. They are not the servants of the captain of the towing boat.

It is the duty of the captain of the boat towed to see to its guidance, to steer it when necessary, and to take the necessary precautions on his part. If he omits such care and precaution, and injury arises from such neglect, he, and not the owner of the tow boat, is to bear the consequences.

Although the master of the towing boat may, as a matter of precaution, give directions as to what is necessary or proper to be done, on board of the boat towed, yet the omission to give such directions is not clearly negligence on his part. It may go to the jury as a fact bearing upon the question of negligence.

THE defendants, a tow boat corporation, were owners of a line of tow boats which plied between New York and Albany in 1863; among them were the boats "McDonald" and the "Austin." The owners of a cargo of corn in Buffalo on the 1st of August, 1863, shipped the corn on the canal boat "J. L. Parsons," to be conveyed from Buffalo to New York. At Albany, on the 19th of August, the *captain* of the canal boat engaged the defendants to tow the canal boat to New York. The tow boat was the "McDonald," and her tow was composed of a barge on one side, some canal boats on the other side, and four hawser tiers of canal boats, each tier having four boats, and all towed astern of the steamboat by a hawser some three or four hundred feet long. The "Parsons" was on

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the port side of the head tier, made fast head and stern. When nearly abreast of West Point, and while rounding "Magazine Point," this down tow met an up tow belonging to the defendants' line, the steamboat "Austin," having in tow, on the port side, a barge, the "Washington," then a canal boat next to the barge, also a number of canal boats on the starboard side. The river is very narrow (about 1500 feet) and crooked at that point, and the shores bold and high. The witnesses differ in regard to the extent of the light there was that night. One class say that it was a very light night, and objects could be seen very plainly on the water at a distance; the other class say that it was not dark but hazy, and that the high banks made it quite shady where the collision occurred. Neither of the tow boats blew a whistle on rounding the point where the collision took place, as the custom required. Instead of keeping off to the west shore, the "McDonald," with her heavy tow, came down easterly of the middle of the river, and kept straight on without even slacking or giving a signal. Both boats being thus out of place, the collision occurred, the head of the barge "Washington" being brought square or bow on to the bow of the "Parsons." The shock was very heavy, broke one or two strong head lines on the barge, stove a hole through the head of the canal boat, so that she sunk in twenty minutes, and caused the barge to spring a leak, so that she would have sunk if she had not received prompt attention. The up tow was going at the rate of eight or nine miles per hour, and the down tow about two miles per hour. Neither tow boat had a watch on her bow, no lookout except the pilot in the pilot-house. It was proved to be customary and necessary to have such watch. It appears to be the rule of navigation in the river for down boats to keep to the west of the middle of the river in turning that point, on such a tide, and for the up boat to hug the east shore, or point. The canal boat "Parsons" had no watch on

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deck at the moment of the collision. The testimony was contradictory as to the fact whether that boat carried a light exposed, but the jury disposed of that question under proper instructions from the judge. The jury found a verdict in favor of the plaintiffs. The plaintiffs were insurers of the cargo of corn, paid the loss, and took an assignment of the claim against the tow boat company, defendants, and appealed from the judgment.

— — —, for the appellants.

Geo. W. Parsons, for the respondent.

INGRAHAM, J. It must be considered as settled, that a tow boat engaged in the business of towing, is not for such purposes a common carrier, nor subject to the liabilities assumed by such engagements. The case of *Wells v. Steam Navigation Co.* (2 N. Y. Rep. 208, and 8 id. 381) decides this point, and I know of no later decision to the contrary.

The defendants, then, were liable for negligence in performing the special duty they had undertaken, and not otherwise. The construction of the words, "at the risk of the master and owners," has been settled, and the cases above referred to, as well as that of *Alexander v. Green*, (7 *Hull*, 583,) decide that such a clause does not excuse the proprietor of the tow boat from liability for negligence in performing his contract.

The point upon which a reargument was ordered, was whether the master of the tow boat was chargeable with negligence because the captain of the barge did not provide a watch or lights on board of the canal boat.

I do not understand the captain of the tow boat to have the entire charge and control of the boats he takes in tow. They are attached to his vessel, but the captain and crew are on board and are required to use care and caution on their part. They are not the servants of the captain of

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the tow boat. His undertaking is to tow them. In doing so he is required to use skill and care to avoid injury, but he does not put his men on board of the boat towed. The captain of that boat must see to her guidance, to steer her when necessary, and to take the necessary precautions on his part. If he omits such care and precaution, and injury ensues from such neglect, he, and not the tow boat, is to bear the consequences.

The master of the towing boat might, as a matter of precaution, give directions as to what was necessary or proper to be done on board of the canal boat, and such directions would more strongly show the negligence of the captain of the towed vessel if not obeyed; but the omission to do so is not clearly negligence on his part. It may go to the jury as all the other facts in the case, and it becomes a question of fact for the jury to decide whether there was negligence, and if so, on whom are the consequences of such negligence chargeable.

This has been so settled by the Court of Appeals in *Milton v. Hudson River Steamboat Company*, (4 *Trans. Rep.* 252.) In that case it was held that the master of the towed boat was bound to use care and caution, and he was bound to use reasonable exertions to protect his property; if he did not, the towing boat was not liable. Grover, J., says: "The defendant is liable for a breach of his contract, but only for such damages as the owner of the towed boat by reasonable care and diligence could not guard against. I think, therefore, it was error to charge the jury that the captain or owner of the property towed must be deemed in law as having surrendered to the steamer such jurisdiction as is necessary to render that towing safe; and that the captain of the steamer would have the right to put lights upon her." And again, where he says: "I charge you as matter of law that it is not a negligent act on the part of the captain of the canal boat, not to keep a watch upon his boat at night."

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This charge was evidently made under the impression that the whole charge of the boat towed was in the captain of the towing vessel, and that the former were not required to exercise any care or caution.

The case referred to, from the Court of Appeals, being in direct opposition to that ruling, the judgment should be reversed and a new trial ordered.

SUTHERLAND, J. There is much force in the opinion of Justice CLERKE, in this case; but upon the whole, I am of the opinion we should grant a new trial, with costs to abide the event. The reported cases do not seem fully to sustain the position I took in the opinion written upon the first argument; and if this position cannot be sustained, I am of the opinion there should be a new trial.

CLERKE, P. J., (dissenting.) If this action was brought by the owners of the canal boat Parsons, for injuries to the canal boat, caused by the negligence of either or both of the defendant's towing boats, the question for the jury would be, 1st. Whether such negligence was proved; and if they decided in the affirmative, did the owners of the canal boat, or their agents, by any negligence on their part, contribute to produce these injuries; and, if they did, the jury should be instructed to find for the defendant. In the case before us, the plaintiff is the assignee of the owner of a cargo of corn, who placed it on board of the canal boat, for transportation to the city of New York, and on the arrival of the boat in Albany caused an agreement to be made with the defendant to tow it by one of his steam towing boats, thence to its place of destination. Is the negligence of the master of the canal boat the negligence of the owner of the cargo? The case of *Milton v. The Hudson River Steamboat Company*, (reported in the 4th *Transcript Reports*, 252,) has been referred to as conclusive

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on this question. That action was brought for the loss of a cargo of staves, shipped in a canal boat on the Erie canal, in some part of Onondaga county, caused by the alleged negligence of the towing company. Although the latter did not place the canal boat in between two deck boats in the tier of boats in which she was placed, as it had contracted to do, as the referee reported that the crew of the canal boat did not exercise proper care over the said boat in the position in which she was placed, the Court of Appeals decided that the towing company was not liable; and in doing so, of course decided that the contributory negligence of the crew of the canal boat was the negligence of the owners of the cargo. In both the opinions delivered in the Court of Appeals, the boat is treated as the boat of the shippers, and the question which I am now considering was not noticed by the court, and I presume not raised by the counsel. In that case it appears that "the plaintiff had hired and chartered the canal boat, for the purpose of transferring the cargo of staves from Onondaga county to New York, paying the captain a price per day for his own and the crew's services." The evidence, or the stipulation, in the case before us, shows that White's Bank, the owner of the corn, shipped the same in the canal boat, and that the proprietors of the boat agreed with the bank to transport the same to New York. The relation of the owners of the cargo to the canal boat seems to me very different, in this case, from what it was in the case to which we have been referred. In the one, the owner of the cargo chartered and took possession of the boat, hiring the master and crew, paying them daily wages, and thus exercised complete control over both the boat, the master and the crew. Of course he was responsible for their negligence; and if that negligence contributed in any degree to the loss, whatever may have been the negligence of the towing company, the

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latter was not liable. In the other, (the case before us,) the canal boat remained under the control of the proprietors of the boat, who employed and paid the master and the crew. I am, therefore, of opinion that the plaintiff is not answerable for the negligence of the master and crew of the canal boat Parsons, and that the only inquiry in this action is whether the master or crew of either or both of the towing boats (the McDonald coming down, or the Austin going up, both owned by the defendant) caused or contributed to the injury of which the plaintiff complains. This is in the nature of an action of *tort*; the act complained of is *tortious*; and the plaintiff has his election to proceed against all the *tort-feasors* jointly, or any one of them severally. If I am right in this view of the case, the judgment should be affirmed, unless errors were committed by the judge at the trial, in his rulings or his charge, prejudicial to the defendant. According to this view, he erred in submitting to the jury the question of negligence on the part of the captain and crew of the canal boat. But this was an error not prejudicial but advantageous to the defendant; as it increased his chances of a verdict in his favor, by telling the jury whether negligence was or was not committed by the defendant, if they were satisfied it was committed, in any contributory degree, by the master and crew of the canal boat, the defendant was entitled to a verdict. I have carefully examined the various exceptions to the rulings and the charge. Most of them relate to the question of negligence on the part of the master and crew of the canal boat; which have no application to the case, under the view I have taken. The only one about which I had any hesitation is the exception to the ruling at folio 349. The witness was asked to state whether any thing could be done on board the McDonald, to avoid the collision. On reflection, I think that it was properly excluded. The witness was called on behalf of the defendant, and was one of the pilots of the

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McDonald. The question was leading, was too general, and called more for the opinion of the witness than for his recollection as to facts.

The judgment should be affirmed, with costs.

New trial granted.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Ingraham and Sutherland, Justices.*]

CAMPBELL vs. EVANS.

Whatever opinion may be entertained as to the remedies provided by the act of the legislature of May 9, 1867, (*Laws of 1867, ch. 814*), amending the act of 1862, entitled "An act to prevent animals from running at large in the public highways," in relation to private trespasses—concerning which, it seems, the act in its amended form is not obnoxious to judicial condemnation—it is beyond question that, as applied to the case of animals at large in the highways, the provisions of the act of 1867 are clearly within the legislative authority, as a just and beneficent exercise of the police power of the government.

The case of *Rockwell v. Nearing*, (35 *N. Y. Rep.* 302,) distinguished from the present.

Where animals are running at large upon the highway, and are seized by the overseer of highways in the district where found, such a case is not only not within the principle decided in *Rockwell v. Nearing*, but is expressly excepted from it in the opinions of both the judges, rendered in that case.

Where animals are found running at large in the highway, and seized by the overseer of highways, and thereupon complaint is made in writing by him, stating the facts, to a justice of the town, it is not necessary the complaint should state that the animals were running at large "by the sufferance or permission of the owner."

The question whether the escape has been suffered or permitted by the owner is not a jurisdictional fact.

The first section of the act makes it unlawful for animals to run at large on the highways, and imposes upon overseers the duty of seizing and taking such animals into their possession; and this is the only fact necessary to be shown, to justify the officer in making the seizure. If the complaint shows this, it gives the justice jurisdiction, in the very words of the statute, to hear and determine the matter.

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An affidavit, made by the person serving a summons issued by a justice of the peace, under the act of 1867, and indorsed thereon, stating that he has served the same, together with proof that such person is a constable, is sufficient to authorize the justice to proceed with the case; although it does not appear by the return that the person making it was a constable.

The 8d section of the act of 1867, which provides that service of the summons shall be made by posting the same in at least six public and conspicuous places in the town, and that one of said places "shall be the nearest district school-house," obviously means the district school-house nearest the *place where the seizure was made*—not nearest to the *justice's office*.

A return stating that the officer served the summons "by posting a copy thereof in six public and conspicuous places in said town, one of said places being the district school-house nearest to said premises," being in the very words of the statute, is to be understood as having conformed to it, and is therefore sufficient.

If it be held, as it must, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, then it belongs to the legislature to determine, in the particular instance, whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which were taken against him.

APPPEAL by the plaintiff from a judgment entered at the circuit on a trial before the court without a jury. The action was for the claim and delivery of two colts and one horse.

The defendant by his answer denied the unlawful detention, and alleged that on the 28th day of May, 1868, and at the time of the taking by him of the said property he, the defendant, was overseer of highways in district number eight in the town of Elbridge, Onondaga county; that on or about the 28th day of May, 1868, the said property was running at large in the public highway in said district number eight, in said town of Elbridge, contrary to law in such cases made and provided; and that on the said 28th of May the said property was taken into custody by the defendant in the proper discharge of his duty as such overseer of highways, under and by authority of section 3, chapter 814, of the laws of the State of New York,

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of service thereof, and the proceedings and judgment by and before said justice of the peace; which objection was also overruled by the court, and to which ruling the plaintiff's counsel excepted. It was then proved by the counsel for the defendant, under the objections and exceptions of the plaintiff's counsel, that the said Ashley was on the 28th day of May, 1868, and ever since had been an elector and constable of said town of Elbridge. It was admitted by the respective counsel that after the adjudication by and before the said justice, and the issuing of said warrant by him, and on the same day, the plaintiff demanded of the defendant the possession of said animals, he, the defendant, then having them in his possession, and that the defendant refused to deliver the same to the plaintiff, or allow him to take the same, and that thereupon, on the same day, after such refusal, this action was commenced. It was further admitted by the respective counsel that at the time the seizure of said animals was made by the defendant, the plaintiff was a resident of the said road district and had ever since been, and that when the seizure was made he, the defendant, knew that the plaintiff was the owner of said animals, and that he gave him no formal notice of such seizure.

The evidence here closed. The court found as matters of fact: First. That on the 28th day of May, 1868, and until after the commencement of this action, the said plaintiff was the owner of the animals described in the complaint in this action. Second. That on that day the defendant, then being overseer of the highways in district No. 8, in the town of Elbridge, seized and took into his possession the said animals, which were then running at large in the highway in said district, and continued to retain possession thereof until the 9th day of June, 1868, and until after the adjudication and issuing the warrant by C. G. McGowan, Esq., a justice of the peace, as herein-

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after mentioned, when the said plaintiff demanded of the defendant the said animals, and the defendant refused to deliver them to or to allow the plaintiff to take possession of them, and that thereupon this action was commenced, and the said animals, by virtue of the proceedings therein, delivered by the sheriff to the plaintiff. Third. That the value of said animals was \$600. Fourth. That immediately upon making such seizure the defendant made a complaint in writing, before Charles G. McGowan, a justice of the peace of the town of Elbridge, and verified the same. Fifth. That upon making of said complaint by the defendant, the said justice issued a summons, dated May 28th, and returnable before him on the 9th day of June, 1868. Sixth. That on the 9th day of June, 1868, at the time and place mentioned in said summons for the return thereof, the defendant in this action appeared before the said justice, and the plaintiff in this action appeared for the purpose solely of objecting to the jurisdiction of said justice. That he did so object, and upon such objection being overruled, the plaintiff in this action participated no further in said proceedings, and forthwith left the presence of said justice. Seventh. That the only return or proof of service of said summons consisted of the affidavit of J. O. Ashley, indorsed on said summons, in which he swore that he served the same on the 29th of May, 1868, "by posting a copy thereof in six public and conspicuous places in said town, one of said places being the district school-house nearest to said premises." Eighth. That upon the return of said summons on the said 9th day of June, 1868, the said justice, upon hearing testimony on the part of the complainant, forthwith rendered a judgment that said animals be sold as provided by section 3, of chapter 814, of the Laws of the State of New York, passed by the legislature of said State, May 9th,

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1867, and that said complainant be awarded the sum of \$1 for each animal so seized as aforesaid,	\$3 00
For care and keeping the same to date of suit,	4 50
In costs of suit,	5 00
J. P. for each animal \$1,	3 00
Penalty to O. P. \$5 for each animal,	15 00
	<hr/>
	\$30 50

Ninth. That on the 28th day of May, 1868, said Ashley was and ever since has been an elector and constable of said town of Elbridge. Tenth. That the said justice did not by writing on said summons authorize the said Ashley to serve said summons. Eleventh. That at the time of the seizure of said animals the plaintiff resided in the road district with the defendant, where the same were seized, and has since continued to reside there. That he was not notified by the defendant of such seizure, nor was said summons served personally on the plaintiff. Twelfth. That upon the same day of the making of said adjudication by the justice, and immediately thereafter, the said justice issued his warrant directed to any constable of said town, for the sale of said animals in the form and manner prescribed by said act, and that thereafter, on the same day, the plaintiff demanded the said animals of the defendant as aforesaid. Thirteenth. That there was no evidence in this action, or before the justice, showing whether the animals were or were not, when seized by the defendant, running at large in the highway by the sufferance or permission of the plaintiff.

As conclusions of law the said court found: 1st. That the complaint before said justice was sufficient to justify the issuing by said justice of the summons. 2d. That the said summons was in due form of law, and valid. 3d. That the affidavit of J. O. Ashley, indorsed on said summons, contained sufficient proof of the due service of said summons. 4th. That the seizure of the said animals by the defend-

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ant, his complaint before said justice, the summons issued thereon by said justice and the affidavit indorsed thereon showing the posting thereof, gave to the said justice of the peace jurisdiction to issue his warrant for the sale of said animals, and justified the defendant in refusing to surrender said property to the plaintiff. 5th. That the provisions of chapter 814 of the Session Laws of 1867, or any part thereof, authorizing said proceedings for the said seizure and sale of said property, were not in conflict with any part of the constitutions of the State of New York or of the United States. 6th. That the defendant was entitled to judgment for the return of said property, and to damages for the detention thereof.

W. & A. B. Porter, for the appellant. I. The respondent, at the time of the demand made by the appellant, was justified in retaining the possession of the animals only upon the fact that the justice, when he made the adjudication and issued the warrant, had jurisdiction and authority so to do. He had no such jurisdiction. 1. The complaint before the justice did not state the facts authorizing the seizure, as required by section 3 of chapter 814, Session Laws of 1867. (a.) It does not state that the appellant was an overseer of highways. The only allegation upon this subject is, that he seized the animals in the highway, which he found running at large therein, within his jurisdiction, as "overseer of highways," &c. This is not an allegation or statement that the respondent was such overseer of highways. An allegation that a person did an act *as* an officer, is not an allegation that the person was at the time such officer. (*Ex parte Bank of Monroe*, 7 Hill, 177. *Ex parte Shumway*, 4 Denio, 258. *Staples v. Fairchild*, 3 Comst. 41.) (b.) It does not state that the respondent was an overseer of highways in road district No. 8, in the town of Elbridge, unless the clause in the complaint on that subject be regarded as an allegation

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to that effect, and in that case there is nothing in the complaint showing that the animals were in the highway "in said district No. 8, in said town," and a failure to make either statement will be fatal to the complaint. This clause in the complaint must be construed either as having reference to and describing the respondent's *office*, or as describing the *locality* where the animals were seized. It cannot be used for a double purpose. If it be used to describe the locality of the seizure, then there is nothing showing that the respondent was overseer of that locality; or, if it is used to show that he was overseer of that locality, then there is nothing showing that the animals were seized in that district. Should the respondent be indicted for falsely swearing, in his complaint, "that he was overseer of highways in district No. 8, in the town of Elbridge," and the court should construe the clause in question as applying to the locality of the seizure, he would of course be discharged. And, on the other hand, should he be indicted for falsely swearing, in the complaint, that the animals were running at large in district No. 8, of the town of Elbridge, and the court should construe the clause in question as having reference to and being descriptive of his office, or the *place* where he found them, he would be discharged on that ground. (c.) The overseer of highways must make the seizure within his district. (Sec. 1 of said act.) The defendant could not be indicted for falsely swearing, in his complaint, that he seized the animals within district No. 8, as there is no such allegation in his complaint. His swearing that he found them there is entirely consistent with his seizure of them elsewhere. In proceedings of this kind the statute must be strictly followed. (*Rockwell v. Nearing*, 35 N. Y. Rep. 310, 312.) (d.) The complainant should have stated in his complaint that the animals were running at large by the sufferance or permission of the owner. (*Idem*, 313, *per Morgan, J.*) This is the only reasonable construction of the statute, for

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the reasons: 1st. That the statute imposes no penalty or costs, and provides for no sale or disposition of animals, unless such as are "suffered or permitted" by the owner to run at large. (See last clause of § 3 of said act.) 2d. The statute clearly intends to give the owner of the cattle an opportunity to show, as a defense, that the animals distrained were not at large by his sufferance or permission, but in all cases, before any defense can be shown, the owner must deny, on oath, some or all the facts stated in the complaint, and should this fact not be stated in the complaint, the owner would lose the benefit of such defense. It would seem to follow, therefore, that such allegation should be made in the complaint. If it be conceded, as it will be, that the owner is entitled to prove such defense, then it cannot be established in this and similar cases, where such allegation in the complaint is wanting, unless the owner consents to commit perjury by denying a complaint, like the one in this case, every word of which is true; that is, he will be under the necessity of swearing to a falsehood in order to be let in to prove the truth. If the complaint, therefore, wanting this allegation, shall be held to be in accordance with the statute, it is respectfully submitted that the statute is not in accordance with the constitution, as it denies to a party the right of being heard in defense of his rights, and thereby deprives him of his property without due process of law. (*Taylor v. Porter*, 4 *Hill*, 146, 147. *Westervelt v. Gregg*, 2 *Kern*. 209, 212. *Wynehamer v. The People*, 3 *id.* 395, 419, 434, 468. *Rockwell v. Nearing*, 35 *N. Y. Rep.* 306, 307.) 3d. Another reason showing that such allegation should be contained in the complaint is, if no one appears to show cause, no evidence is allowable before the justice, and he proceeds to issue his warrant upon the facts contained in the complaint. How then can the complaint omit the allegation which alone justifies the sale of the property, as appears to have been done in this case. If

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the views of Justice Morgan in the case of *Rockwell v. Nearing* are sound, of which there is no doubt, that the sufferance or permission of the owner is a fact essential to the liability of such owner, it follows that such fact, among others, should, according to the requirements of the act, be stated in the complaint. It not having been so stated, consequently renders the complaint and all proceedings based upon it void. An illustration of the propriety of this position is found in this case before the justice, when, without any allegation in the complaint, or proof before the justice, that the animals were suffered or permitted to run at large, he has proceeded to issue a warrant for the sale of the property, and adjudged penalties and costs against the owner to the amount of \$30.50, which the statute does not authorize him to do, unless the animals shall have been "permitted," &c. 2. The summons issued by the justice was void. (a.) The act in question (§ 2) requires that "the justice shall issue a summons stating the fact of such seizure." The summons in this case does not state the fact of the seizure, but merely recites that William S. Evans had stated the fact of such seizure in his complaint to the justice. (b.) If the summons in this case be regarded as a "process," it should have been in the name of the people of the State of New York. (2 *Bur. L. Dic.* 497. 2 *R. S.* 275, § 16, *chap.* 3, *title* 1.) (c.) The paper claimed to be a summons is not one in fact, but merely an order by the justice to show cause. (*See* 6 *Jac. Law Dic.* 137, *as to meaning of term.*) 3. There was no return upon the summons, or any proof showing service thereof. Where no one appears to show cause, such return or proof is necessary to confer jurisdiction or authority upon the justice to adjudicate upon the case, or to issue a warrant for the sale of the property. (*Sess. Laws of* 1867, *ch.* 814, § 3. 14 *John.* 481.) (a.) The only return or proof of service was the affidavit of J. O. Ashley. So far as the action of the justice and the question of his juris-

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diction is concerned, the service must be regarded as made by a person "other than a constable," for the reason that Ashley did not sign his name officially; nor was there any evidence before the justice that Ashley was a constable, and service by a person other than a constable cannot be made, unless by a person duly authorized by the justice in writing, upon the summons. (See § 3 of said act.) Such authority appears not to have been given. (b.) The affidavit of Ashley is not the proof of service contemplated by the act. 1st. Such proof evidently means oral testimony before the justice, by which an opportunity may be afforded the justice of putting questions to the witness, as to the facts constituting the service. 2d. The affidavit was made out of court three days before the return day, and is extra-judicial. (c.) It appearing in this case that the service was in fact made by a constable, as the statute provides for no affidavit or proof of service in such case, it is clear that the affidavit of Ashley (being the constable purporting to have made the service) is extra-judicial and void. It is only in case of service by the person other than a constable, that proof of the facts constituting the service can be introduced. (d.) It cannot be claimed that the affidavit, although extra-judicial, is tantamount to a return by Ashley, as constable, or the summons "duly served," as required by the act. 1st. It does not purport to be an official act for which, if false, he could be indicted for a breach of official duty, or sued for a false return, by an aggrieved party. 2d. The statute does not allow the constable, in his return, to make a statement of facts as to the service, leaving it with the justice to decide whether, from the facts stated, the summons be duly "served," but it makes the constable the sole judge, and imposes upon him the sole responsibility of determining whether he has complied with the statute or not, by requiring him to return the summons simply "duly served." (e.) The term "return" has a distinct

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legal signification. It means a certificate of the officer acting officially, indorsed on the writ or process returned by him. (5 *Jac. Law Dic.* p. 523, *tit. Return.*) The constable was not, therefore, at liberty to substitute an affidavit for his certificate. (f.) The affidavit does not show that a copy of the summons was posted on either the school-house nearest to the justice's office, or the one nearest the place or point where the seizure was made. The act (§ 3) requires one of the notices to be posted on the "nearest district school-house," leaving as a matter of construction what the term "nearest" has reference to. It is manifest, however, that the statute must read one of two ways, to wit, "nearest to the justice's office," or "nearest to the point or place where the seizure was made." But, according to either reading, it will be seen that the affidavit does not show that a notice was posted on the school-house nearest to either place. The expression in the affidavit, "nearest to said premises," if having any meaning, certainly does not mean nearest the justice's office. The only thing mentioned in the whole proceedings to which the term "premises" can with any semblance of propriety be applied, is "road district No. 8, in the town of Elbridge;" and if the term "premises" be held to have reference to the road district, it is evident that the affidavit is deficient, for the reason that, as between several school-houses, the one which is nearest to the road district may be farthest from the place where the cattle were seized. (g.) But it is insisted by us that the term "nearest," in the statute, should be construed as referring to the justice's office, because, 1st. The justice's office is the only place which appears to be referred to in the section prior to the occurrence of the term "nearest." 2d. The posting of this summons is spoken of in this section as the posting of a "notice," and is intended to perform, in a great measure the office of posted notices in the original act, of which this is an amendment. That act (§ 3) pro-

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vided that one of the notices should be affixed on the "district school-house nearest to the residence of such justice or commissioner," and an intention on the part of the legislature to depart from or change this provision will not be presumed. (*Taylor v. Delancy*, 2 *Caines' Cases*, 150, 151.) (h.) It is claimed by us, however, that the expression in the affidavit, "nearest to said premises," is utterly meaningless, and of no effect, rendering the return a nullity. 4. The taking of the animals by the respondent was a distress, and subject to all the incidents of a distress at common law, one of which is that the distrainor must, after the distress is made, follow the directions of the statute, if any, in relation to the final disposition of the property, and a failure to do so will render him a trespasser *ab initio*. (*Sackrider v. McDonald*, 10 *John*. 253, 258. *Durmot v. Smith*, 4 *Denio*, 320. *The Six Carpenters' case*, 8 *Coke*, 290. 3 *B. Inst.* 43.) The statute requires the distrainor immediately to make complaint in writing, stating the "facts." At the time of the commencement of this action, over ten days had elapsed, and he had failed to make such complaint, but still claimed to hold the property. It is evident he was, by such omission, a trespasser *ab initio*; at all events, that he was not, at the time demand was made, justified in further retaining possession of the property. At the time the demand was made, the justice had completed all the proceedings in relation to the property which it was competent for him to entertain, and if the final adjudication and issuing of the warrant by him for the sale of the property was void, either from defect in the complaint or summons, or on account of a want of proof of the service of the summons, certainly the defendant was not then justified in further retaining possession of the property.

II. The act in question, especially as regards the respondent in this case, is in conflict with the constitution, as it allows the taking and depriving a person of property

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without due process of law. 1. It deprives the appellant of the privilege of being heard in defense of his rights and the preservation of his property, inasmuch as it requires him to swear falsely as a condition to his being heard in such defense. (*See ante, sub. (c.) sec. 3, point 1. Empire City Bank, 18 N. Y. Rep. 215, per Denio, J.*) Judge Denio, in this case, says (by implication, at least,) that an act depriving a person of property is unconstitutional which affords him no opportunity of defending. 2. The provision of this act for giving notice and bringing known resident parties into court by a proceeding not looking to a personal service of the summons or notice of the proceedings, is in that respect unlike any proceedings to divest persons of their property allowed at the time of the adoption of the present constitution, and cannot be regarded as a proceeding "by due process of law," within the meaning of that instrument. 3. The act in question requires no stated time for posting notices. If posted only one day, the constable would be protected in making the return "duly served," as prescribed by statute, and the justice would have jurisdiction. This renders the proceeding totally unlike any of those where notice was given by advertisement at the time of the adoption of the constitution, and cannot, on that account, be regarded due process of law. Such provision for giving notice is merely "colorable and illusory," and on that account a fraud upon the constitution. (*See opinion of Denio, J., in matter of the Empire Bank, 18 N. Y. Rep. 216.*) 4. It allows a justice of the peace to award damages and compensation to be taken out of the property of another, without affording him a trial or opportunity of contesting the amount of damages or compensation.

C. B. Sedgwick, for the respondent. I. The act of 1867 (chap. 814) is valid and constitutional. (*Rockwell v. Nearing, 35 N. Y. Rep. 302.*) The obnoxious features of the

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act of 1862 (chap. 459) are all removed by the amendments of 1867. The benefits to the public of preventing animals running at large in the highways, are so obvious and so important that the courts should seek to uphold laws enacted to secure that end. It is a proper and beneficial exercise of the police power in the State. (*Opinion of Morgan, J., in case cited.*)

II. All the facts necessary to give the magistrate jurisdiction existed, and the necessary proceedings were taken, as required by the statute. 1. By the first clause of section first it is made unlawful for cattle to run at large in the highway, and it is the duty of every overseer of highways within his district to seize and take into his possession, and keep till disposed of according to law, any animal so found running at large. (a.) This compels the overseer to seize the animals running at large, that is, not being in charge of the master or owner, or his servant, at the time, without regard to the question whether the escape of the animal upon the highway is voluntary or involuntary, or accidental, so far as the owner is concerned. (b.) The question of whether the escape is voluntary, and has been suffered or permitted by the owner, is only material on the trial, and is not a jurisdictional fact. That it is accidental or involuntary may be proved by the owner to defeat the claim for a penalty or forfeiture. Accordingly, if the justice errs in respect to this, the remedy is by certiorari or appeal, but the proceedings are not void. (See section 1, second clause, and compare with first clause.) 2. The seizure having been made, the third section requires certain further proceedings to give the magistrate jurisdiction. (a.) The overseer is immediately to make a complaint in writing, stating the facts, to a justice of the peace of the town. This was complied with. 3. The justice was thereupon clothed with "jurisdiction to hear and determine such matters." (Section 3, second clause.) 4. He is thereupon directed to proceed and forthwith issue his

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summons, as set forth in that section. This was complied with. 5. The summons is to be served by a constable (or by an elector duly qualified and appointed) in the manner specified. 6. The mode of service prescribed; i. e., by posting notices or copy of summons, is not unconstitutional, and is within the power of the legislature. "Personal service is not required to constitute process of law." (*U. S. Trust Co. v. U. S. Fire Insurance Co.*, 18 N. Y. Rep. 199. *Opinion of Morgan, J., approving opinion of Denio, J.*, 35 N. Y. Rep. 314.) 7. The service, as proved by the sworn return of the constable Ashley, was according to the requirements of the statute. It was objected that "the nearest district school-house," mentioned in the act, was the school-house nearest the residence of the magistrate. This is not the true construction, as will be seen by reading the sentence to the end. The terms of the act are plain. The school-house nearest the premises where the seizure is made is the one where the notice would be most likely to attract the notice of the owner, as the magistrate may live in a remote part of the town.

III. The act is of great public utility, and should stand if it is within the legislative power. The rights of the individual owner seem to be well guarded by the subsequent sections. In this case there can be no pretense that there was any want of personal notice, for the owner appeared; and it is hardly possible that it can occur that the owner will not have notice before his property can be disposed of, if the provisions of the law are complied with in good faith. If there is found concealment or oppression under it, the law affords a remedy which the courts will always be glad to administer.

By the Court, BACON, P. J. The questions presented for adjudication in this case involve, among others, the constitutionality of the act of 1867, amending the act of 1862, entitled "An act to prevent animals from running at large

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in the public highways." The case presented the following facts: The action is replevin by the plaintiff as the owner of three horses. The defendant was overseer of highways for district No. 8 in Elbridge, and the horses were found by him running at large opposite his premises within the said district. As overseer he seized the horses, and immediately made complaint in writing before a justice of the town, who thereupon issued a summons, as required by the act, and placed it in the hands of a constable of the town, by whom it was duly served pursuant to the directions of the act. On the return day of the summons, the plaintiff appeared for the purpose only, as the case states, of objecting to the jurisdiction of the justice, and particularly on the ground that the complaint was insufficient, which objections were overruled, and the plaintiff then withdrew from the court. The defendant then made proof of the facts which authorized the seizure, and the penalties provided by the statute were adjudged by the justice, who subsequently issued his warrant for the sale, as provided by the act, previous to the execution of which the plaintiff replevied the property and took it into his possession, where it has ever since remained.

On the trial the proceedings were all given in evidence under objections at every stage, and the general objection was taken that the provisions of the act under which the proceedings were had were unconstitutional and void. This proposition is the last one discussed upon the points of the appellant's counsel. If well taken it is fatal to the defense, and will render unnecessary the examination of any other objection, and it should therefore be first disposed of. This objection professes to be founded on the decision of the Court of Appeals in *Rockwell v. Nearing*, (35 N. Y. Rep. 302.) That decision was wholly in reference to the act of 1862, and arose in a case where animals were seized while trespassing upon the premises of the defendant, and not while they were running at large in the

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highway. It was in reference to that case that the court held the act unconstitutional, because it authorized the seizure and sale without any appropriate process, of animals found trespassing within a private inclosure. If this were just such a case, it would still be necessary for us to examine the act of 1867, and see whether the amendments introduced into that enactment do not (as they undoubtedly were intended) obviate the defects which existed in the act of 1862, and provide the necessary legal machinery for effectuating the object the legislature had in view, to wit, abating the nuisance of animals running at large to the annoyance of the public, and to the injury of private rights.

But it is not expedient to anticipate such a case, which may hereafter arise, and render the examination necessary. In this case the animals were running at large upon the highway, and were seized by the defendant in the strict performance of the duty enjoined upon him by the act as overseer of highways, in the district where the animals were found. Such a case is not only not within the principle decided in *Rockwell v. Nearing*, but is expressly excepted from it in the opinions of both the judges rendered in that case. Thus Judge Porter says: "The question whether the act is valid, so far as it relates to the seizure and sale of animals running at large in a public highway, is not involved in the present appeal. That issue might well be controlled by considerations connected with the police powers of the government." On this point also Judge Morgan says, with equal explicitness, when speaking of the power of the legislature to authorize the seizing of cattle running at large on the highway, that "it may properly be called the police power of the legislature which they are authorized to exercise for the public good;" and he adds, "that, upon the ground that it is an injury to the public for cattle to be running at large upon the highways, the legislature may punish the owner for

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permitting it." Whatever opinion, therefore, we may entertain as to the remedy provided by the statute in relation to private trespasses—concerning which I have a pretty clear conviction that the act in its amended form is not obnoxious to judicial condemnation—I think it beyond question that as applied to the case of animals at large in the highways, as were these of the plaintiff in this case, the provisions of the act of 1867 are clearly within the legislative authority, as a just and beneficent exercise of the police power of the government.

The only other objection which seems to me to have much force or pertinency is, that no jurisdiction was given to the justice, by the proceedings, to hear and entertain the case. The cattle were found running at large in the highway, and the duty of the defendant, by virtue of his office, was to seize them. He is then by the act to make complaint in writing, stating the facts, to a justice of the town, who is by section 3d thereupon clothed with jurisdiction to hear and determine the matter. If the complaint is sufficient, jurisdiction is conferred, and if any irregularities subsequently occur, they are, I suppose, to be corrected by an appeal, for which ample provision is made by the 6th section of the act. In what respect did the complaint fail to give jurisdiction to the justice? On the trial before the justice, the objection was merely that the complaint was insufficient, and on the trial at the circuit, that the complaint was not in accordance with the statute, and failed to confer jurisdiction, without in either case specifying any particular in which it was insufficient, or failed to comply with the statute. On the argument, the only plausible objection made is that the complaint does not state that the animals were running at large "by the sufferance or permission of the owner," in which event, only, can the penalty provided by the act be imposed. The conclusive answer to this is, in my opinion, that the question whether the escape has been suffered or

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permitted by the owner, is not a jurisdictional fact. The first section of the act makes it unlawful for animals to run at large on the highway, and imposes upon overseers the duty of seizing and taking such cattle into their possession. And this is the only fact necessary to be shown to justify the officer in making the seizure; and if the complaint shows this, it gives the justice jurisdiction, in the very words of the statute, to hear and determine the matter. The section then goes on to provide further for the infliction of a penalty upon the person who shall suffer or permit any animal to thus run at large; and this inquiry is one to be made on the trial. The officer cannot be supposed to know, nor is he bound to inquire, how the fact is, in the first instance. He finds the animals at large, and his duty is performed in making the seizure, irrespective of the question how they came to be at large. If it is accidental or involuntary, or was brought about by the willful act of any other person, the facts may be proved by the owner, to defeat the claim for the penalty, and in the latter case, a remedy over against the person committing the willful act is given by the statute, as an ample penalty to be recovered by the owner. In the case of *Rockwell v. Nearing*, a doubt is suggested by Judge Morgan whether the seizure of cattle on the highway, under the act of 1862, would be lawful without showing that they were there by the negligence or permission of the owner; but he takes occasion to add that, "there may be some question whether the burden of proof is not cast upon the owner of the cattle to show that he is without fault in such a case." If this was a reasonable construction of the act of 1862, as I think it was, it is entirely applicable to the act of 1867, which gives the justice unquestionable jurisdiction upon the facts stated as they were in the complaint made to him by the defendant.

The return of the officer serving the summons was objected to on several grounds. One was that it did not

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appear by the return that Ashley, who served it, was constable, and the act provides that the service may be made by a constable, or by an elector authorized by the justice in writing to make the service. The proof of service was by the affidavit of Ashley, and it was proved on the trial that Ashley was a constable of the town of Elbridge. The act provides no form in which a return shall be made, and the sworn return in this case, with the proof that the same person making the service was a constable, was sufficient to authorize the justice to proceed with the case.

It was also objected to the return that it did not show that the service of the summons was in conformity with the statute. The act provides that the service of the summons shall be made by posting the same in at least six public and conspicuous places in the town, and one of said places "shall be the nearest district school-house." The question raised by the appellant's counsel is, whether the statute means nearest the justice's office, or nearest the place where the seizure was made. In respect to the return of the officer, he insists that if it means any thing, it means nearest to road district number eight in Elbridge. And he claims that the term "nearest" in the act should be construed to refer to the justice's office.

I think he is wrong in both respects. The return of the officer is in the very words of the statute, and is of course to be interpreted by it. The words of the act are not as full and specific as they might have been made. The expression is elliptical; but it obviously means the district school-house nearest the place where the seizure was made. It would be quite uncertain where the magistrate would live, or have his place of business. It might be in a remote part of the town quite distant from the residence of the owner, who, it would be most natural to infer, would not ordinarily live far from the spot where his animals would be found; and as the object of the law was to afford the means best calculated to give him notice, that object would

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be more likely to be effected by a copy posted on the school-house nearest the point of seizure, than one as suggested, nearest the justice. Such, in my opinion, is the obvious meaning of the language of the act, and the return is to be understood as having conformed to it, and was therefore sufficient.

It is insisted by the appellant's counsel that the whole proceedings were void for want of a personal service of notice, or of some kind of process by which the plaintiff, whose property was taken, could have had the opportunity to appear and contest the right to dispose in any way of his effects. It might be a sufficient answer in this case to say that the plaintiff can with no grace make that complaint, for he did get notice, and he did appear and objected to the proceedings, just as far as he elected to do so, and then voluntarily abandoned his case. But a better answer perhaps can be given in the words of Judge Denio, in the *matter of the Empire Bank*, (18 N. Y. Rep. 216 :) "If we hold, as we must, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, then it belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which were taken against him." This the legislature have done in the act of 1867, and I see, as yet, no ground fairly to challenge their right to do so.

I think the judgment should be affirmed.

Judgment accordingly.

[ONONDAGA GENERAL TERM, June 29, 1869. Bacon, Mullin, Foster and Morgan, Justices.]

THE PEOPLE, *ex rel.* William Mitchell and others, commissioners of highways of the town of Greenfield, vs. ZIMRI LAWRENCE and others.

The writ of *certiorari*, in its office of removing final adjudications for review, possesses all the characteristics of a writ of error under our former system of practice, and performs the same office, as to inferior summary tribunals, that a writ of error did to an inferior court of record.

The common law *certiorari*, proper, removes only the record, or entry in the nature of a record, of the proceedings of the court below, whereby only the jurisdiction and the regularity of its proceedings are reviewed. But when the writ is authorized by statute, the authority of the court is not limited to questions of jurisdiction and regularity. It has power also to examine, upon the merits, every decision of the court, or officer, upon questions of law, and to look into the evidence, and affirm, reverse or quash the proceedings, as justice shall require.

The writ may properly issue to review the action of a jury in the reassessment of damages under the highway act, on appeal from the decision of commissioners appointed by a county judge.

The act of the legislature "in relation to the plank road law in the county of Saratoga," passed February 27, 1864, which enacts that "if any plank road in Saratoga county, used for six years, shall be abandoned, or its charter expire by its own limitation, or forfeiture, such plank road, and its right of way, shall become and is hereby declared a public highway," and makes it the duty of the commissioners of highways of the town to take the same measures for appraising the reversionary interest of the owners whose lands were taken for such plank road, &c., as are required by the statute in relation to the appraisal of damages for laying out public highways, &c., is not unconstitutional.

It is not in conflict with any express provision of the constitution, nor an infringement of any natural right.

Statutes free from these objections cannot be declared void by the courts.

Within this limit, the legislative will is sovereign.

Wherever there are more than one commissioner of highways, in a town, notice of appeal from an assessment of damages, under the highway act, must be served on each and all of the commissioners. If there are three commissioners, service upon one alone is not sufficient.

This notice and service is a condition precedent to jurisdiction. Without it, no authority exists for drawing and summoning a panel of jurors, and the justice has no authority in the premises; nor have the jurors summoned and drawn, any jurisdiction of the subject matter.

The legislature having seen fit to exercise its power of eminent domain, by dedicating abandoned plank roads to the public as highways, the interest which reverts to the original owners of the land, on the abandonment of a

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plank road, includes everything—the soil, the fences thereon, the right of way, and all the advantages, if any, arising from its former use.

It is this property which the legislature has dedicated to the public ; and it is this interest which is required to be appraised and compensated for. Hence, it is proper for the jury summoned to reappraise the reversionary interest of the land owners along the line of an abandoned plank road, on appeal from an appraisement made by commissioners appointed by the county judge, to take into consideration the cost of fencing the road, keeping the fences in repair, and the inconvenience to the use of the land arising from the necessity of crossing and recrossing such road.

THIS is a common law certiorari, brought to review the action of a jury in the reassessment of damages, under the highway act.

The facts are these: A plank road company was organized in Saratoga county, under the act of 1847 ; after procuring the right of way, it constructed a road and had it in use in 1852 ; in May, 1867, it abandoned a certain portion thereof, and the highway commissioners of the town where located applied to the county judge and had commissioners appointed to appraise the reversionary interest of the owners along its line. The commissioners met and, on due notice to all, fixed upon a valuation. The owners being dissatisfied, served a notice of appeal on the town clerk and on *one* of the *three* highway commissioners, demanding a jury, and stating that a jury would be drawn by the clerk of an adjoining town on a day named ; that on said day a jury was drawn, a justice of the peace issued a summons to compel their attendance, handed the same to a constable for service, and the same was duly served. Neither of the commissioners not served had any knowledge or information of such appeal until after the jury was drawn. On the day named in the summons, eleven of the twelve jurymen summoned appeared, and six were drawn to sit in the matter. The commissioners appeared on this day, and in due time objected to the proceedings: 1st. That the jury could not be drawn until all the persons summoned appeared. 2d. That the notice was insufficient,

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because not served on all three commissioners. 3d. The jury had no jurisdiction to entertain the proceedings. 4th. The statute authorizing the proceeding was void. The justice ruled against these objections, and the commissioners excepted. The jury were then sworn, proceeded to view the premises and receive evidence. The evidence offered by the land owners was objected to as irrelevant and improper, and as not presenting the true rule for appraisement; but the justice and the jury held they had no right to entertain the motion, and so the evidence was taken, under protest. Evidence was then given of the cost of fencing the road and keeping it in repair, and the inconvenience of its use by reason of said road. It appeared that said road was already fenced; that the fences belonged to the owners, and that the expense had been included in the damages paid the owners by the plank road company. The commissioners again renewed their objections, and demanded a decision, but it was refused. The jury made an award, in which they included the expense of fencing, keeping the same in repair, and the inconvenience in the use of the farm, doubling the award made by the commissioners of appraisement.

The highway commissioners are the relators in this proceeding, and are owners of real and personal estate in said town liable to taxation.

L. Varney, for the relators. I. The writ of certiorari was properly issued. It was brought at the suit of the people on relation of the individuals. The individual names of the commissioners of highways are properly inserted in the writ. (*Overseers of the Poor of Granville v. Webster*, 2 How. Pr. 187. *Wildy v. Washburn*, 16 John. 49. *The People v. Van Alstyne*, 32 Barb. 131.)

II. There is no other remedy whereby the proceedings can be reviewed, except by the writ of certiorari, and this writ will issue to review proceedings of turnpike assessors,

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and also to review assessments made by appraisement of the value of land taken by a railroad company. This court will also review the proceedings and evidence, for the purpose of discovering whether or no the damages are correct, or made upon an improper basis, even where they are authorized by statute finally to hear and determine. (*Le Roy v. Mayor &c.*, 20 *John.* 429. *Hill v. Mohawk Railroad Co.*, 5 *Denio*, 206; *S. C.*, 3 *Seld.* 152, 182. *Lowton v. Com. of Highw. of Cambridge*, 2 *Caines' R.* 179. *Bradhurst v. President and Directors*, 16 *John.* 8, 13. *People ex rel. Van Rensselaer v. Van Alstyne*, 32 *Barb.* 131. *King v. Bagshaw*, 7 *T. R.* 363. 8 *id.* 542.) In the case of *Carter v. Newbold*, (7 *How. Pr. R.* 166,) Justice Strong says, this court should abstain from interfering with the decision of inferior tribunals in cases within their jurisdiction on questions of fact; but they are bound to interfere to correct mistakes in the law bearing upon the merits.

III. A certiorari will lie on the behalf of the commissioners, to remove the proceedings into this court, the right to bring a certiorari being reciprocal and belonging as well to the commissioners as to the appellant. (*Com'rs of Highways of Kinderhook v. Claw*, 15 *John.* 537.)

IV. On a common law certiorari to remove proceedings into the Supreme Court, the same must be served upon the clerk with whom the papers are filed. (*Hill v. Mohawk Railroad Co.*, 3 *Seld.* 152. *Com'rs of Kinderhook v. Claw*, 15 *John.* 537. *The People ex rel. Reynolds v. City of Brooklyn*, 49 *Barb.* 136.) It cannot be served on the justice who issued the summons. (*Pugsley v. Anderson*, 3 *Wend.* 468.)

V. It is insisted that this writ was properly issued and made out, and the service correct; but if there are any defects, either in the issuing or title, it may be amended. (*The People ex rel. Strait v. Steuben C. P.*, 5 *Wend.* 103. *Bird v. Silsbie*, 1 *Cowen*, 582-88. *Mott v. Com'rs of Highways of Rush*, 19 *Wend.* 64. *Kissam v. Morris*, 2 *id.* 258.)

VI. It is claimed by the commissioners that the jury had

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no jurisdiction to reassess the damages of the land holders, on the grounds: 1st. That service of the notice of appeal was only made upon one of the commissioners of said town, and the other two commissioners knew nothing of drawing the jury. 2d. That only eleven jurors appeared from which to draw the panel, and only that number put in the box. By the statute of 1847, chap. 455, § 3, upon an appeal for a reassessment of damages by a jury, any person conceiving himself aggrieved, or the commissioner or commissioners on the part of the town, if feeling dissatisfied by any such assessment, may, within twenty days after the filing thereof as aforesaid, signify the same by notice in writing, and serving the same on the town clerk, and on the opposite party, that is, the persons for whom the assessments were made, on the commissioner or commissioners of highways, as the case may be. In this case there are three commissioners, and one cannot act when there are three. It clearly was not the duty of Mitchell to notify the other two commissioners of the service of notice of appeal; it was no part of his official duty to assist said landholders in perfecting their appeal. Therefore there was no appeal taken in this case. Any act that Mitchell should do by virtue of the appeal, would be void. It requires three commissioners to make an order or transact any business (or the notice to the third, and the subject of deliberation embraced in the notice.) All three are but one body. (*Fitch v. Com'rs of Highways of Kirkland*, 22 Wend. 132. *The People ex rel. Dann v. Williams and others, Commissioners of Highways of Avon*, 36 N. Y. Rep. 441.) It was held in the case of the *Com'rs of Highways of Kinderhook v. Claw*, (15 John. 537,) that on an appeal from the commissioners of highways relative to laying out, altering &c. a highway, the appellant must give notice of the appeal to the commissioners, and if such notice was not given, the commissioners may bring a certiorari, on which the proceedings on appeal will be re-

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versed. (*Bradhurst v. The President and Directors*, 16 John. 8-12. 7 Barb. 416. *Stewart v. Wallis*, 30 id. 344.) If the court has no jurisdiction, consent will not give it. (3 *Caines' Rep.* 129. *Case of Ferguson*, 9 John. 239. *The People ex rel. Stephens and Tallman v. Commissioners*, (36 Barb. 222. *The People ex rel. Lord v. Robertson*, 26 Hom. 90.)

VII. The commissioners' affidavits show that they own real estate, and are tax-payers in the town of Greenfield. They also show that Debrat Peck owns the fences on both sides of this road, and that Wing, her brother, received \$255 damages, by the road going through the farm, he then being owner. Lawrence received, as damages, \$250 from the plank road. The evidence shows that the land owners, when the road was built, received a little over \$3000 for their damages, and they now seek unjustly to recover the same again, when the evidence shows the road bed along the line of this road in question is not worth anything. (*Ex parte v. Mayor of Albany*, 23 Wend. 277.)

VIII. A large amount of the evidence introduced by the landholders was for the purpose of showing the value of building and keeping in repair the fences along the line of the road in question, and the damages to the several farms through which the road passes, which was objected to by counsel for the commissioners. The fences have always belonged to the land owners, and did before the road was abandoned, and since it was abandoned. The fences did not revert, and could not, for the adjoining owners were the unqualified and absolute owners and possessors thereof. No reversion can be had where the highest estate already exists. This argument is too plain and simple to require authorities in support of the same; hence the proof of building and maintaining was wrong, and a matter they had no right to investigate. The same remarks apply to proofs of the damages to the several farms through which the road passes, as the owners had already been compensated. Hence the court will inquire into the principles

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upon which the jury assessed the damages, and if they were erroneous the whole assessment should be set aside. (*Baldwin v. Calkins*, 10 *Wend.* 166. *Stone v. Mayor of New York*, 25 *id.* 157.)

IX. These proceedings are irregular and void, and are without authority, and came into existence by mistake, and upon ignorance of the facts (probably caused by the law of 1864, chap. 25, which is clearly unconstitutional.) This court is clothed with jurisdiction at common law, as well as by statute. Under the Code, the equitable rights of the parties, as well as the legal, are to be considered. (Section 69.) This court has the power, and it is their bounden duty, not only to set aside the action of the jury and their award of damages, but to set aside and declare null and void the award of damages made by the commissioners of appraisal. The statute of 1864, for the appraisal of reversionary interests, after the abandonment, refers to plank roads constructed under the provisions of "an act to provide for the incorporation of companies to construct plank roads, and of companies to construct turn-pike roads," passed May 7th, 1847. This statute of 1864 declares that in case of abandonment or the expiration or forfeiture of the charter of a plank road company, "such plank road and its right of way shall become and is hereby declared a public highway." Section 2 of said act, after reciting the abandonment, requires the commissioners of highways "to take the same measures for appraising the reversionary interest of the owners whose lands have been thus taken, as are required by the statute in relation to the appraisal of damages in laying out public highways in this State, and the damages thus ascertained, with the expense of the appraisal, shall be a charge upon the town wherein the lands are situated, to be levied and collected in the same manner as other town charges," for laying out public highways. This statute does not say that the land owners have an interest in the road, nor that they have, or will

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have, a reversionary interest. And the only ground for any interest in this road after abandonment by the company, is inferential from section 2 of said act. There is no repealing clause in this statute, and the same is not in conflict with the statute of 1854, chap. 87, § 1, which provides that the directors of any plank road company, or turnpike company, formed under the act passed May 7th, 1847, after pointing out the manner of the declaration of surrender, in abandoning said road by the company, says: "Such declaration and consent shall be filed and recorded in the clerk's office of the county in which the part or parts of said road abandoned shall be situated, and thereupon the plank or turnpike road, or the portion thereof so surrendered, shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed." This cannot apply only to the abandonment of the plank road constructed upon a public highway, but it certainly applies to the abandonment of a plank road where it was originally laid out and constructed through a man's farm. This was the construction put upon this statute by the attorney and counsel for the commissioners of highways, before the commissioners of appraisal, and also the jury, although the counsel for the landholders argued that it did not in any sense apply to the laying out and constructing a plank road through a man's farm where there was no public highway. As long ago as 1838, (chap. 262,) a statute was passed, that "whenever any turnpike corporation shall become dissolved, or the road discontinued, its road shall become a public highway, and be subject to all legal provisions regulating highways." Hence the town of Greenfield, upon the abandonment of said road by the company, succeeded to all their right, title and interest in said road, the same became a public highway, and nothing reverted to the land owners. All the interest the plank road company acquired in and to said lands was a right of way

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through said lands for traveling purposes or easement, which was for the public use. These land owners or their grantors have been paid for that use; or if not paid it was donated for that purpose; but in this case they were fully paid, and now, after the abandonment of said road by the company, it is still used for a public highway, an easement for traveling purposes, and no change made, only it is controlled by different persons or officers. The case of *Heath v. Barman* (49 Barb. 496) is the law of this case, and clearly shows that these land owners are not entitled to any compensation whatever, and that they now have no more interest or right in the road in question than they had when the plank road company was in full force and operation.

XII. This road, upon its abandonment by the plank road company, belonged to the town, and the town became the actual owner and possessor thereof for a public highway. The town is not estopped from claiming on this argument, as heretofore, that the land owners have no claim to or interest in the road, or right to demand damages anew. A party in possession of lands recognizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition, or made under a misapprehension of his rights. (*Jackson v. Spear*, 7 Wend. 401. *Jackson v. Cuerden*, 2 John. Cases, 353.) The above cases are stronger than this, for here the commissioners of highways have never agreed to pay the land owners; for nothing reverted under the statute of 1864 to the said land owners.

XIII. There has been nothing done by the town to give the respondents a greater interest in this road than they had at the time of the abandonment. They have only, under a misapprehension of the facts, taken, as they supposed, legal means to recover this road for the town. And

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by this step no acknowledgment of any interest in the respondents has been made. The town have, in fact, been trying by this litigation to recover what actually belongs to them, and of which they are in possession. By doing this they have surrendered none of their rights which they acquired upon the abandonment of said road by the company. The respondents have not lost or been damaged by any act of the commissioners of the town. The cases of *Lansing v. Montgomery*, (2 John. 382,) and *Jackson ex dem. Jones v. Brinckerhoff*, (3 John. Cases, 101,) show that *estoppels* are not favored in law, and will not be indulged in when, as in this case, they would produce injustice. (Confirmed by *Williams v. Jackson*, 5 John. 491.) Even ignorance or mistake will prevent an estoppel. (*Griffith v. Beecher*, 10 Barb. 432, and cases there cited. *Sparrow v. Kingman*, 1 Comst. 242. *Averill v. Wilson*, 4 Barb. 180. *Bigelow v. Finch*, 11 id. 498. *Germond v. The People*, 1 Hill, 343. *Borst v. Corey*, 16 Barb. 136. *Cadwell v. Colgate*, 7 id. 253. *Reynolds v. Lounsbury*, 6 Hill, 534.) The respondents had as much knowledge of the facts and law as the commissioners of the town, and they were not misled or deceived in any particular as to their rights. (*Brewster v. Striker*, 2 Comst. 19. *Lewis v. Woodworth*, Id. 512. *Cohoes Co. v. Goss*, 13 Barb. 138. *Jackson ex dem. Whitlocke v. Mills*, 13 John. 463. *McCoon v. Smith*, 3 Hill, 147. *Champlain &c. Railroad Co. v. Valentine*, 19 Barb. 484. *Dwight v. Peart*, 24 Barb. 55. *Jackson ex dem. Thurman v. Bradford*, 4 Wend. 619. *Jewett v. Miller*, 6 Seld. 402. *Jewell &c. v. Harrington*, 19 Wend. 471. *First Baptist Society v. Rapalee*, 16 id. 605. *Allen v. Roosevelt*, 14 id. 100. *Child v. Chappell*, 5 Seld. 246. *Lawrence v. Brown*, 1 id. 394. *Carpenter v. Stilwell &c.*, 1 Kernan, 61. *Lounsbury v. Depew*, 28 Barb. 44. *The People v. Highway Comm'rs of Seward*, 27 id. 94. *Dempsey v. Tylee*, 3 Duer, 74. *Stoughton v. Lynch*, 2 John. Ch. Rep. 209.)

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E. L. Fursman, also for the relators. I. The act under which these proceedings are had, for an assessment of the value of the reversionary interest of the respondents in the lands formerly used by the Saratoga and Hadley plank road, after its abandonment by the company, (*Chap. 25 of Laws of 1864*), is unconstitutional. Section 16 of article 3 of the constitution of the state provides, that "no private or local bills which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This act is strictly local. It relates solely to the county of Saratoga, and has no operation anywhere else. 1st. It embraces more than one subject. The first section provides that whenever any plank road company, having acquired the right of way across private lands by an appraisal and payment of damages, pursuant to the general act of 1847, shall abandon the same, or when its charter shall expire or become forfeited, such plank road and its right of way shall become and the same is declared to be a public highway. The second section makes it the duty of the commissioners of highways of the town to take the same measures to appraise the reversionary interest of the owners whose lands have been taken for plank road purposes, as are required to be taken in laying out new highways; and that the damages thus ascertained shall be a town charge, to be levied and collected in the same manner as other town charges for laying out highways. The subjects legislated upon in these two sections are not the same. Nor does the one necessarily grow out of the other. These lands were actually paid for by the company, in 1850, under an assessment, pursuant to the statute of 1847. Declaring them to become upon abandonment a public highway, and providing for an assessment, collection and payment of the value of the reversionary interests of the adjoining proprietors, and the manner in which that is to be accomplished, are two different things. 2d. Neither of the subjects mentioned in the body of the act are ex-

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pressed in its title. The act is entitled "An act in relation to the plank road law in the county of Saratoga." Neither of the two sections of the act mention any plank road law in the county of Saratoga. The act does not pretend to be an amendment of or an addition to any plank road law in that county. It does not even purport to be an amendment of the general act of 1847. It does not change, affect, nor in any respect alter or interfere with any plank road law. It simply declares that abandoned plank roads in Saratoga county shall become highways, and provides for an assessment and collection of damages to reversionary interests. Neither of these subjects are referred to in the slightest manner in the title. It is therefore in conflict with the constitution. All the proceedings had under the act are without authority, and the jury acted without jurisdiction. (*Const. of N. Y. art. 3, § 16. Laws of 1864, ch. 25, pp. 46, 47. Town of Fishkill v. Fishkill and B. Plank Road, 22 Barb. 634, 641-3.*) The commissioners of highways themselves acted without authority, and had no jurisdiction to procure the appraisal by the persons appointed by the county judge. It follows that the appeal was equally without authority and jurisdiction. (*Harrington v. People, 6 Barb. 607, 611. People v. Eggleston, 13 How. 123.*)

II. The service of the notice of appeal from the first appraisal, demanding a reassessment by a jury, and of the time and place of the drawing of such jury, was insufficient and not properly made. Neither Lyman or Rowland (two of the commissioners) were served with the notice, nor did they have any knowledge of any appeal, nor of the drawing of the jury, until after it had been drawn. Notice was served on only one commissioner, viz. Mitchell, the father-in-law of one of the land owners. They were entitled to be present at the drawing of the jury, but were deprived of this right by want of notice. The statute authorizing an appeal from the appraisal of commissioners

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appointed by the county judge, (3 *Edm. Stat. at Large*, p. 312, § 3,) provides that such appeal may be had within twenty days after filing such appraisal, by serving a written notice of the same on the "commissioner or commissioners of highways, as the case may be," asking for a jury, and specifying the time and place of the drawing of such jury. It is provided by law that the town electors may determine at their annual town meeting whether there shall be *one* or *three* commissioners of highways in the town, and the number decided upon shall be balloted for and chosen, &c. (3 *Edm. Stat. at Large*, p. 311, § 2.) Where there are *three* commissioners chosen, it is necessary that *all* should meet and deliberate, or at least that all should be *notified*, in order to make any official act of even a majority of them valid. Unless this rule is complied with, any order made by two of them is void. (*Stewart v. Wallis*, 30 *Barb.* 344. *Marblé v. Whitney*, 28 *N. Y. Rep.* 297. 36 *id.* 441.) The language of the statute above referred to is peculiar. Service is to be made "upon the *commissioner* or *commissioners* of highways, as the case may be." The legislature intended that where there is but *one* commissioner, service shall be made on him; but that where there are *three*, service shall be made on each of the three. Otherwise they would have said simply that such service should be made "on the commissioners of highways." This would have covered a case where there is only *one* commissioner, and would have rendered sufficient a service upon *one* only in a case where there are *three* commissioners. But instead of this, they designate and *separate* the two cases. They provide that in case there is only *one*, service may be made on the *commissioner*; and in case there are three, service shall be made on the "*commissioners*," meaning each of the commissioners. And the reason of this is a sensible one. One of the commissioners cannot *act* alone; two cannot act without the third is notified. If a party desires to appeal from the result of their action, he must put them

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in a position where they are called upon to act, and to act properly and legally in reference to such appeal. No proper and legal action can be taken by them until all have met and deliberated, or been notified, and hence he must serve his notice upon all. The service of this notice is necessary to make the appeal, and to confer jurisdiction upon the jury, which is, in this case, the appellate tribunal. Therefore, even if the law of 1864 is constitutional, and the action of the commissioners under it in procuring the assessment by the appraisers appointed by the county judge valid, the appeal by the land owners to and the reassessment of damages by the jury, are without jurisdiction and void.

III. The assessment was made by the jury upon a wrong basis, and the amounts awarded to the several respondents are excessive. These respondents had already received "\$3000" from the Saratoga and Hadley Plank Road Company for their damages consequent upon the appropriation of this "way" to a public use. In arriving at that sum, regard was had to the value of fencing against the plank road, and the inconvenience occasioned to the owners by having to cross and recross a public road, in the use and enjoyment of their farms. The only right acquired by the company by this appropriation of these lands in 1850, and the assessment and payment of these damages, was an easement, the right to use it as a public way. The fee subject to this easement remained in the land owners. They still owned the reversion, and upon abandonment by the company or forfeiture of its charter, they became as completely and absolutely the owners of the roadway as they were before its use was appropriated by the company. The law of 1864 declared that upon such abandonment or forfeiture by the company, their road and "*its rights of way*" should become and be a public highway, and it was then made the duty of the commissioners of highways "to take the same measures for *appraising the reversionary*

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interests of the owners," as are required in the case of laying out highways, &c. But upon appraisal and payment of the value of this reversionary interest, the town would not become the owner of the fee. A town, though a *quasi* corporation, cannot take and hold the fee of real estate, whether by gift, grant, devise or purchase. This proceeding does not, therefore, vest in the town the absolute title to this roadway, but only the same easement theretofore owned and enjoyed by the company. The fee of the road continues in the original owners. Upon its ceasing to be a roadway it reverts to them. Their estate in reversion is just as perfect after it has become a town highway as it was while it was a plank road. (8 *John*. 385. 9 *id.* 73.) When the public cease to use it as a highway, they are again the absolute owners of the soil unincumbered by any easement. Hence, by this law, the town of Greenfield is required to pay for what it does not receive; and if any effect is to be given the statute at all, the amount of damages should be only nominal. The expenses of making and maintaining the fences along the road, damages on account of the inconvenience of crossing and recrossing the same, and the diminished value of the remainder of the several farms by reason of the road running through them, (of all which evidence was allowed to be given to the jury under objection, and was doubtless considered by them in making their assessment,) formed an improper basis upon which to found their award. But it may be said that this view of the law deprives it of all consequence, and makes it an absurdity. Then, to give it the best reasonable construction that can be put upon it, and assuming that the town can be vested with the whole title by this proceeding, it is clear from the language of this statute that the legislature considered (what was in fact true) that on laying out the plank road originally, the land owners were fully compensated for the appropriation of their lands to the public use, the disadvantage of being

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compelled to fence against it, and the inconvenience of crossing and recrossing it, incident to its use as a road. The first section declares that "such plank road, and *its right of way*, shall become and is hereby declared a public highway;" that is, the right of the plank road company to the use of these lands shall be vested in the public. The land owners were paid by the company for the inconvenience resulting from the use of these lands as a public way for all coming time (if this road should so long continue.) In the absence of an express provision in the law directing it to be done, it would be unfair and inequitable to the public to compel them to pay the land owners damages on account of a thing for which they had already been fully compensated. The legislature, in the first section, grants to the public the entire right of way possessed by the company; but it is a settled principle that on the termination of the existence of a corporation, the real estate held by it at the time of its dissolution, and acquired by it for a public use under the right of eminent domain, reverts to the original owners. To continue the use of the lands as a public highway would impair the value of this reversionary interest, which was not parted with nor paid for when the plank road was laid out; and, if the first section stood alone, would be taking private property for public use without just compensation. To remedy this, the legislature passed the second section of the act, providing that the commissioners of highways shall cause to be appraised, not the damages caused by the construction of the highway, nor the expense of fencing against and the inconvenience of crossing it, incident to its construction, but *the value of this reversionary interest alone*. It is therefore apparent that this law intends to provide, and does provide, that the right of the plank road company to the use of this road, fenced as it already is by the land owners, and with the already existing inconvenience of crossing and recrossing it, purchased and paid for by such com-

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pany, shall vest in the public; that the land owners shall only be paid for the sole interest which they did not sell to the company, and for which they were not compensated by it, viz., the expectation that the title would revert to them at the expiration or forfeiture of its charter. The jury, therefore, erred in considering and assessing the value of any thing more than this naked reversionary interest, and the whole assessment is founded on an erroneous basis. This court has full power to review this question upon the writ. (*Mullins v. The People*, 24 N. Y. Rep. 399, 402.)

Wm. Hay, for the respondents. I. Service of notice of appeal personally on one commissioner was sufficient; it being addressed to all of them by their name of office; their individual or Christian and surnames being unnecessary. If in the statute (*See 1 R. S. 4th ed. p. 1043, § 78*) the alternative singular number applies to a case where there is but one commissioner, personal service, nevertheless, on one for all suffices; the words, "as the case may be," relating to the acting, moving or appealing *party*, a word which, with the prefix *opposite*, is applicable to several commissioners, who therefore constitute but *one party*, already appearing as such in the action or litigation pending before commissioners appointed on their own application. Commissioner Mitchell's act of receiving the notice was *ministerial* only, and could therefore be done by him alone, without the concurrence of his associates, who had no discretion to exercise and could not refuse. The commissioners are *quasi* a corporation, and notice to one member or corporator, director or officer, or agent, whose duty relates to that subject, is enough, by whatever name known, be it president, or cashier, or other title. Even if those commissioners were mere *agents* and the town their principal, notice to an agent transacting the business, within scope of his authority, is enough, and every other agent

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need not be notified. Commissioners, however, more resemble executors, copartners, joint tenants, (as distinguished from tenants in common,) and especially attorneys composing a law firm, service on any of whom, of one notice, is all-sufficient. (*Owners v. Mayor &c. of Albany*, 15 *Wend.* 374. *U. S. Bank v. Davis and others*, 2 *Hill*, 451. *North River Bank v. Aymar*, 3 *id.* 263. 1 *Hall*, 480. *National Bank v. Norton*, 1 *Hill*, 572. *Field v. Mayor of New York*, 2 *Seld.* 179. *Fulton Bank v. N. Y. and Sharon Canal Co.*, 4 *Paige*, 127. 4 *Abbott's Digest*, 189.) The case of *Fishkill v. Fishkill and Beekman Plank Road Co.*, (22 *Barb.* 634,) proves that towns are merely political or civil divisions, and have no "rights or duties in respect to highways." *A fortiori* commissioners of highways are officially *quasi* a corporate body, and to suppose that notices must be served on each and every member of an aggregate corporation or association is absurd. It would often be impracticable and usually so inconvenient as to impede business.

II. The jury had jurisdiction derived from the commissioners' initiatory application to the county judge and all consequent proceedings, without any proof to them of the regularity of those proceedings as to contents and service of notices and acts of town clerks &c., the law presuming that in all interlocutory proceedings, public officers have performed their duty, and that too on proper information or due proof. Hence a provision contained in the Session Laws of 1847, (page 223, § 24,) but omitted in the revised statutes regulating this appeal, which is an informal, summary, neighborhood affair, unlike a regularly constructed action *in curia*. It more resembles an arbitration ordaining its own rules and practice, and statutory requirements relating to it are precautionary and *directory*, not *mandatory* nor jurisdictional, and disregard of them is merely erroneous, not *irregularity*.

III. The justice's powers are limited to those specified,

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(incidental being thereby excluded,) as they were not in the act of 1847. (*Sess. Laws of 1847, p. 222, § 22, and preceding sections.*) He had no authority to coerce attendance of the twelfth juror or supply his place, as was provided for deficiency of referees and commissioners (but not jurors) in 1 Revised Statutes, page 1044, section 84. Besides, jurors enough appeared for a draft of six, according to the practice or custom of all courts. Whoever heard that a circuit court (even with power of coercing attendance and ordering either a new draft by the clerk, or tales summoned by the sheriff) cannot draw a jury until the original list or panel is completely full, especially by attendance of every person named in it?

IV. The subject of appraisal or reassessment, whether as compensation or damages, direct or incidental, is the whole estate or entire absolute ownership in fee simple, or, perhaps, allodium of the four rods plank road width. This will appear from an answer to the following questions: First inquiry—Before the first day of May, 1867, how was the entire ownership of the plank road divided? Answer—The plank road company owned the ties, planks and other material, so much of the ground as was necessary—by which is meant reasonably convenient for their purposes—and a right of way (*Town of Galen v. Clyde and Rose Plank Road Co., 27 Barb. 543*) or of passage, being a species of easement during the continuance of their charter, (less, of course, than thirty years,) and at its termination the privilege of removing all they had put there except fixtures. All the residue of the whole estate and every subject of ownership, especially fences, which are fixtures, or part of the realty, (and never assets,) belonged to the land owner, particularly fences on his own land and outside of the four rods. (*See 1 R. S. 525, § 126; Williams v. Kenney, 14 Barb. 629; Jackson v. Hathaway, 15 John. 447; and 1 Wend. 262, concerning rights and privileges in presenti; Dunham v. Williams, 36 Barb. 136; and Kelsey*

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v. *King*, 32 *id.* 410.) Second inquiry—On the 1st day of May, 1867, the plank road company abandoned that part of their road, and thereby (without any hindrance from the statute of 1864) and at that instant, their whole interest reverted or returned to, and became vested and operative in the land owner by *extinguishment* of the company's right of way, not *merger*, because the land owner derived from no other source any lesser estate which merger implies, just as *life* is presupposed of drowning. Even the legislature could not impair the obligation of the plank road contract, and certainly did not by the act of 1864, to prevent that extinguishment or suspend the consequent reverter, the reversion being executed in possession. Our statute defining an estate in reversion is declaratory of the common law. "A reversion," writes Kent, "is the return of land to the grantor and his heirs, after the grant is over, or, according to the formal definition of the New York Revised Statutes, it is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in *possession* on the determination of a *particular* estate granted or devised." "A reversion, in its legal signification, is applicable only to an estate which remains in the grantor and his heirs, and which is to take effect in *possession* upon the determination &c. of an outstanding *particular* estate." A right to re-enter and resume the possession for the breach of a condition, is not a reversion. (*Phoenix v. Com. Emigration*, 12 *How. Pr.* 1. 2 *Black. Com.* 175.) The land owner's reversion that formerly subsisted in this case as to the plank road company's particular estate, was by no means subject to the act of 1864; but in the provision of which all parties concerned have, notwithstanding, acquiesced. Without such acquiescence in the nature of consent, the legislature, exercising one attribute of sovereignty, or "eminent right of domain," might dispense with the usual preliminaries to a certain necessity, and declare (as in conclusion of section 1 of the

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act of 1864) that "such plank road and its former right of way shall become, and is hereby declared a public highway." So, however, to transform the road, just compensation (not under-valuation, or valuation of part only) must be provided; the change being material as to duration, forever in lieu of less than thirty years, and the purpose a public common highway, instead of a plank road, thereby enhancing damages. The land owner, too, might desire the advantages of a plank road or railroad, and be opposed to a second common highway cutting up his farm, over which, and parallel and near, a highway already passed his door from the same *termini a quo* and *ad quem*. Those facts and circumstances, and many similar considerations too numerous to be here specified, would necessarily enter into the damages or compensation; words which should therefore have been incorporated in the statute instead of "*reversionary interest*," which has there no significance, unless declaring the plank road and its former right of way a public highway, mean to leave in the land owner (e. g. on discontinuance of that public highway) the unincumbered and unqualified title to the land; notwithstanding the questionable opinion delivered in *Heath v. Barman*, (49 Barb. 496,) under the statute of 1854, instead of that of 1864, which expressly provides for compensation to the land owners. That, however, is just what the people of this State never take, and do not intend to acquire. Yet, on a literal interpretation of the 1864-act, that *reversionary interest* is all the State either bargains or proposes to pay for, leaving the road-bed, while it is used as a public highway, without the least compensation to the land owner. This view of the subject involves the sheer absurdity that this State would have no right to use the four rods wide as a public highway until they had abandoned it for that purpose; and worse, it would involve the injustice of paying nothing for the public highway bed while they (for centuries if you please) may continue to use it as such;

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and after (if ever) it ceased to be so used, and all necessity for ownership by the State had ceased, it would become unconstitutionally a part of (not the public highway but of) the public domain, taken without necessity or authority, or adequate compensation. This reflection brings us to the real point in this case without reference to the misnomer "reversionary interest," an error that may be corrected by expunging as surplusage or expletive the word "reversionary," which is incongruous when considered in connection with the rest of the statute and circumstances of this case. By the plank road company's abandonment in 1867, the limitation or condition of defeasance (on their own deliberate and recorded act) occurred, and all their title thereupon ceased; for (*see Sess. Laws of 1847, pp. 224, 225, §§ 28 and 30*) the plank road company had become, on payment or tender of compensation, damages, costs and expenses, *entitled* only "to take and hold such lands to it and to its assigns so long as it shall be used for the purposes of such a road as such company was formed to construct," and no longer. Nor can that plank road company, on such voluntary abandonment or otherwise, recover back from a land owner what they paid to him as such compensation or damages; nor could their assigns, (which the people are not;) and if, as a condition of allowing part abandonment of the plank road, the people had become assigns, they could not so have recovered. Then why should the State do *indirectly*, by deducting such last mentioned compensation from what they pay for land to be used as a public highway, when they could not accomplish that injustice *directly*. The truth is that all plank road operations are *quoad hoc*, to all intents and purposes ended, as per the last above cited statute, on its abandonment, and no right to use the land for a plank road can be revived even for the State; much less can a right to use it as common public highway, forever, be substituted. Besides thus surrendering all its claims, the plank road

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company's *interest* was only *possessory*, not *reversionary*, and therefore not the subject of appraisal for any purpose whatever; nor can any of its claims enure to the benefit of this State. When the act of 1864 provides for appraising the land owner's reversionary interest at a just compensation, it must be a full equivalent for what the land owner loses, (incidental inconveniences, such as separation of fields and deprivation of water in some of them, &c., inclusive,) and for what the public takes. Did that public when directing an appraisal, in the same way in which, and with the same purpose for which, damages are appraised "in laying out public highways in this State," intend to take and pay for the land owner's right to use and protect the land for all legal purposes, not inconsistent with its public use as a highway and to retain his right to its *reverter* (of which there is at least a probability) on discontinuance as a highway? Certainly not; but on the contrary to leave those rights with the land owner, and to take and pay for the use (technically usufruct) of the highway as such only. Certainly, therefore, a reasonable common-sense interpretation of the statute (on every known rule of construction to ascertain legislative intention) requires the same appraisal as if, instead of informally declaring the land a highway, it had been (as it virtually is) an original laying out in the usual mode, by town officers, over land which had never been used (six years or at all) for a plank road or other public servitude, nor protected or guarded against by any fence. At all events, whether in their statutory connection the words "reversionary interest" mean something or nothing, any thing or everything, they must be so expounded (if operative at all) as to give to the land owner a full indemnity, and consequently confer on the State right to a complete present use of the land as a public highway. Such perfect indemnity the commissioners, embarrassed by the statute phraseology did not award, and the jury unrestricted by the partic-

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ular statute, but acting under the general highway act, assessed no more; for, having an actual view, and after hearing the allegations and proof of every party, they found a verdict which may be reconciled to any view of the subject, whether including or excluding the value of fences and repairs. But be that as it may, those fences (which probably occasioned, if not caused, this controversy) belonged exclusively to the land owner (who had perfect right to remove the rails and restore his fields or inclosures so as to include the former plank road-bed,) and whether allowed for by the jury, (as by the commissioners had slightly been,) in addition to compensation for the land, does not appear; nor can that be inferred from the testimony admitted, because there was no power to exclude nor to reject arithmetical calculations, nor to confine the evidence strictly to facts, nor to limit opinions to experts. Those fences, whether remaining there in whole or part or to be builded, were proper subjects for allowance, and constitute what is called in the papers an *element* of damages. Independent of constitutional provisions, (see U. S. constitution, amendments, article 5, and N. Y. constitution, article 1, sections 6 and 7,) the legislature cannot, upon principles of natural right, without just compensation, take private property, (which this four rods wide plot was, after the plank road company's abandonment of it,) even for public use. Such governmental taking is indeed the highest act of sovereignty, and can be tolerated on dedication by the owner only, or by equivalent necessity (the supreme law) and perfect compensation, without any rebate for benefits to be derived to that owner from the public improvement. (*See Session Laws of 1847, page 222, section 23.*) Numerous cases are cited in *Abbott's Digest*, volume 1, page 639, and especially pertinent and decisive is the adjudication in *Beckman v. Saratoga and Schenectady Railroad Co.*, (3 Paige, 47.)

V. The certiorari in this case is at common law, and

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limits inquiry to jurisdiction; but cannot reach interlocutory proceedings, or a verdict founded on conflicting evidence; especially is this correct concerning the reception and rejection of evidence. (*The People v. First Judge of Columbia Co.*, 2 Hill, 398. *Owners v. Albany*, 15 Wend. 374, *above cited*.) "The act of drawing jurors, &c., in highway cases, is not a *judicial* act, and a certiorari does not lie to review it." (*Pearsall v. Commissioners of North Hempstead*, 17 Wend. 15. *Matter of Mount Morris Square*, 2 Hill, 14.) "If, on a common law certiorari, the court can go beyond the question of jurisdiction and review questions of law, it is certain it cannot review questions of fact." (*Allyn v. Commissioners of Schodack*, 19 Wend. 342. *People v. Overseers of Ontario*, 15 Barb. 282.) And see numerous adjudications referred to in 1 *Abbott's Digest*, pages 543, 544 and 545, too numerous to be cited. "The return to a common law certiorari does not properly embrace the evidence, and though this be in fact returned, the court will not re-examine the merits." (*People ex rel. Cook v. Board of Police*, 40 Barb. 626. *People ex rel. Savage v. Board of Health*, 33 id. 344. *People ex rel. Van Rensselaer v. Van Alstyne*, 32 id. 131.) In *Stone v. Mayor &c. of New York*, (25 Wend. 157,) Judge Paige's elaborate opinion turns on and terminates in a mere matter of *jurisdiction* concerning an erroneous construction of a statute or incorrect principle of assessment. (*Matter of Bruni*, 1 Barb. 187.) This doctrine is confirmed by perusal of *The People v. Van Alstyne*, (32 Barb. 131,) the Claverack case, on which the Greenfield commissioners principally rely. (*See opinion of Cowen, J., in Ex parte Mayor &c. of Albany*, 23 Wend. 276.) *Carter v. Newbold* (7 How. 166) is a mere *dictum*; being judicial legislation *solus*. *Anderson v. Prindle* (23 Wend. 616) was not a common law certiorari, except in part.

VI. The act of 1864 is constitutional; but if it was otherwise, objections or reasons which render it invalid must be specified; and they would (even in an assignment

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of errors) come too late, and cannot now be heard, especially from the highway commissioners who instituted or originated these proceedings under it and by virtue (or at least color) of it; the land owners merely followed suit, and acted accordingly. So all concerned in this litigation, and particularly those commissioners of highways who initiated the proceedings, have expressly (constructively would suffice) waived those objections, and are thereby estopped in that behalf. The land owners are also estopped—wherefore there is required mutuality—they having waived available objections, due process of law, and even their undoubted right (arising out of natural justice) to be pre-notified and heard on appointment, by a county judge, of appraising commissioners. *Embury v. Conner* (3 N. Y. Rep. 511) shows that even consent may be presumed; and also that a statute should (if possible) be so construed as to render (or rather leave) it constitutional and otherwise valid; e. g. the act of 1864 should, in reference to the misapplied phrase, “reversionary interest,” and in other respects, be so interpreted as to furnish full compensation (whatever that may be) for such interest appropriated to the public use. (*Van Hook v. Whitlock*, 26 Wend. 43. *Lee v. Tillotson*, 24 id. 337. *Baker v. Braenan*, 6 Hill, 47. *Tombs v. Rochester &c. R. R. Co.*, 18 Barb. 583. *Hayward v. Mayor of New York*, 8 id. 486.) “So a party having land taken for a public improvement, who has taken a part in an assessment of his damages in the mode prescribed by the statute authorizing the improvement, cannot, after an award, object on the ground that such mode is in violation of the constitution.” (*People v. Murray*, 5 Hill, 468.) Highway commissioners cannot blow hot and cold at the same breath. If they adopt part of a statute to promote their own selfish purposes, they cannot reject that same identical part when it does not comport with those purposes. They have elected, and are thereby concluded. Otherwise in a reported case, (*People v. Town of Seward*,

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27 Barb. 94,) where they were naked trespassers, (as was also the constable in *Tucker v. Malloy*, 48 Barb. 85,) acting in good faith. There they might either pause or retract and tender amends. In this case their *locus penitentie* was before the verdict of an impartial jury had been rendered. That should have been an end of strife; but these Greenfield commissioners have, instead of seeking such peace, by the way, suffered the sun to go, frequently, down upon their wrath. (*Wood v. Livingston*, 11 John. 36. *Steam Nav. Co. v. Weed*, 17 Barb. 378. *Palmer v. Smith*, 6 Seld. 303. *Peck v. Burr*, Id. 294. *Walrath v. Redfield*, 4 Smith, 457. *Ford v. Townsend*, 1 Abb. Pr. N. S. 159. *Decker v. Anderson*, 39 Barb. 346. *Root v. Wagner*, 30 N. Y. Rep. 9. *Stackpole v. Robbins*, 47 Barb. 212. *Chapman v. Com'rs of Gates*, 46 id. 313.)

By the Court, JAMES, J. The writ of certiorari was proper in this case. It is a writ directed to the judges or officers of inferior courts or tribunals, commanding them to return the record of a cause or proceeding pending or had before them. In its office of removing final adjudications for review, it possesses all the characteristics of a writ of error under our former system of practice, and performs the same office as to inferior summary tribunals that a writ of error did to an inferior court of record. The common law certiorari, proper, removes only the record, or entry in the nature of a record, of the proceedings of the court below, whereby only the jurisdiction and the regularity of its proceedings are reviewed. But when the writ is authorized by statute, the authority of the court is not limited to questions of jurisdiction and regularity; it has power also to examine upon the merits every decision of the court, or officer, upon questions of law, and to look into the evidence, and affirm, reverse or quash the proceedings, as justice shall require.

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(2 *Seld.* 309, 883.) The writ in this case was authorized by statute.

In 1864 the legislature enacted that "if any plank road in Saratoga county, used for six years, should be abandoned, or its charter expire by its own limitation or forfeiture, such plank road, and its right of way, should become, and was thereby declared, a public highway." It then made it the duty of the commissioners of highways of the town to take the same measures for appraising the reversionary interest of the owners whose lands were taken for such plank road, &c., as are required by the statute in relation to the appraisal of damages for laying out public highways, &c.

It is first claimed that this act is unconstitutional, and that it came into existence by mistake. We cannot say as to any mistake in its being enacted, but we are quite sure it is not unconstitutional. It does not seem to be in conflict with any express provision of the constitution, nor an infringement of any natural right. Statutes free from these objections cannot be declared void by the courts. Within those limits the legislative will is sovereign.

It is also claimed that the jury had no jurisdiction to act, because the notice of appeal was not properly served. The statute, to which the act of 1864 refers as a guide for appraising the reversionary interest in cases of this kind, provides, first, for the appointment of commissioners, and then any person conceiving himself aggrieved by their valuation may appeal, by signifying the same by notice in writing, and serving the same on the town clerk and upon the commissioner, or commissioners, and asking for a jury to reassess the damages. The act then provides for drawing twelve persons from an adjoining town, as jurors; summoning them to attend at a place to be specified; the drawing of six names from the panel;

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these to view the premises, hear the evidence, and report. Thus the appeal from an award of the commissioners of assessment selected by the court is by written notice of appeal, with a demand for a jury, &c.; and this notice is required to be served on the town clerk, and on the opposite party.

In 1845 an act was passed authorizing towns to reduce the number of highway commissioners to one. Many towns in the State availed themselves of that privilege. Under that act, persons desiring a reassessment of damages for land taken for highway purposes, were to signify the same by serving a written notice on a justice of the peace of the town, demanding a jury. Said act was amended in 1847, in regard to this matter of reassessment, and fixed as the law now stands. Therefore the fact that some towns, in 1847, had but one highway commissioner, while others had three, would imply an intent and purpose in those words of the amended act, "commissioner or commissioners," and force the conviction that the legislature intended, as essential to an appeal in such case, service of notice on each and all the commissioners of highways, as the case might be, rather than on the board.

There are reasons why each commissioner should have notice of an appeal. They can only act when convened as a board, all being present or notified of a meeting. Their official territory is limited, and nearly every case arising for the action of the board concerns the neighbor or relative of one or more of the commissioners, when more than one. If a service upon one were sufficient, it would put it in the power of that one, if any motive existed, by omitting or forgetting to notify his associates, and not appearing himself, to leave the town in default, and allow a jury of reappraisement to be drawn without opposition. But the legislature has said, in very plain words, what is necessary to be done to entitle an aggrieved party to appeal; and

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even if the courts are unable to find a reason for all its requirements, yet such conditions as are imposed cannot be dispensed with, as they form part of the conditions conferring jurisdiction. This notice and service is a condition precedent; without compliance with it, no authority exists for drawing and summoning a panel of jurors; without it the justice had no authority in the premises, nor the jurors summoned and drawn any jurisdiction of the subject matter.

This view of the question of service of notice entirely disposes of the present case; but as the case may come up again, I will examine another question raised.

The matter most discussed on the argument was the basis of appraisal adopted by the jury, viz., in taking into consideration the cost of fencing the road, keeping the fences in repair, and the inconvenience to the use of the land in having to cross and recross such road.

The plank road company had but an easement in their roadway; the fee was in the land owners. On its abandonment, the possession of the land, freed of the easement, would have reverted to the original owner, but for the aforesaid statute. In its wisdom the legislature has seen fit to exercise its power of eminent domain, and dedicate abandoned plank roads to the public. First, in 1838, but without making any provision for compensating the original owner; again in 1854, without any provision for compensation. For this omission the constitutionality of the acts of 1838 and 1854 was questioned. The act of 1864, under which this proceeding was instituted, avoided that difficulty, by making it the duty of the highway commissioners to have the reversionary interest of the original land owner appraised and paid for.

What then was the nature and extent of the interest which reverted to the original owner on the abandonment of this plank road? It is urged that because the

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original grantor owns the fences along its line, because he has been paid by the plank road company for making and keeping them in repair, as well as for the land, he has no interest except the naked right of reversion, on the actual discontinuance and closing up of the road; that as a town cannot take a fee in the land over which a highway passes, but only an easement, the land owner's interest of reversion remains undisturbed; and therefore he sustains only nominal damages by reason of an abandoned plank roadway being declared a public way.

Such was not the legislative intent, nor a fair construction of the statute. All acts should have a reasonable construction, and their intent followed if it can be ascertained from the act.

A reversionary interest is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. The particular estate granted out by the land owner in this case was an easement for a plank road-bed; on the determination of that particular estate, the land owner was entitled to possession; thus having the fee and being entitled to possession, his reversionary interest included everything; the soil, the fences thereon, the right of way, and all the advantages, if any, arising from its former use. It was this property which the legislature dedicated to the public, and it was this interest which was required to be appraised and compensated for. I am therefore of the opinion that the jury did not err in their basis of estimate, although they may have erred in the value of the items forming that estimate.

Had the appeal from the appraisement of the commissioners appointed by the county judge been served on all the highway commissioners, so as to confer jurisdiction on the town clerk to draw a panel of jurors, a justice of the peace to summons, draw and impanel a jury, and the

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jury to act, their action would not be disturbed; but, as it is, as jurisdiction could only be conferred on a jury to act in the manner pointed out by statute, the appraisal must be reversed.

[WARREN GENERAL TERM, July 18, 1869. *James, Roskrans, Potter and Becker, Justices.*]

• JOHN ANDERSON and others vs. CLEMENTINE O'REILLY.

Where the defendant, when called upon, on several occasions, to pay the plaintiff's debt, put them off, stating that her husband, every night, took all the money which she had received during the day and paid it to persons from whom she had bought goods; which payment was disproved, by affidavit; *Held* that the act of the defendant, in allowing her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, was to be deemed done with intent to defraud her creditors; that she was therefore amenable to the charge of having "disposed of" her "property with intent to defraud" them; and that, consequently, the plaintiff was entitled to a warrant of attachment, under the provisions of section 229 of the Code.

APPEAL from an order made at a special term, denying the defendant's motion to vacate a warrant of attachment.

By the Court, CARDOZO, J. The appellant moved, at special term, to vacate a warrant of attachment which had been issued against her property. She made no affidavit in support of the motion, but relied upon the alleged insufficiency of the plaintiff's affidavit; and of course, therefore, the only question presented by the appeal is, whether, conceding the facts stated in the plaintiff's affidavit to be true, a case to warrant the issuing of an attachment was made out. I am clearly of opinion that it was. The

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substance of the affidavit is, that when called upon, on several occasions, to pay the plaintiff, the defendant put it off, stating that her husband, every night, took all the money which she had received during the day, and paid it to persons in the city of New York from whom she had bought goods. The payment to such persons is disproved by the affidavit; so it stands conceded that the defendant has allowed her husband to take possession of all her money, and has made a false statement of the purpose to which it was appropriated. No other inference can be drawn than that such disposition of the defendant's money to her husband, coupled with a falsehood as to the purpose for which he took it, was made with intent to defraud her creditors, whom she put off upon the false pretext which she assigned. The defendant, therefore, is amenable to the charge of having "disposed of" her "property with intent to defraud" her creditors, and that being so, the plaintiff was plainly entitled to the warrant, under the provisions of the 229th section of the Code. The sole question is one of construction of the language of the affidavit, and I think the judge below interpreted it exactly right, and that his order should be

Affirmed with costs.

[NEW YORK GENERAL TERM, June 7, 1869. *Clarke, Cardozo and Geo. G. Barnard, Justices.*]

THE PEOPLE, *ex rel.* Henry H. Hathorn and others, vs.
JOHN H. WHITE.

By an act of the legislature, the trustees of a village were authorized and directed to issue the bonds of the village, executed by them, and *signed by the president of the village*, to a specified amount, bearing an interest not exceeding seven per cent per annum, which bonds were to be payable within thirty years, the interest to be paid semi-annually; and the avails of such bonds were to be used for the purpose of supplying the village with water. A form of bond having been adopted by the trustees, they resolved to proceed, and execute and deliver to the commissioners of construction, bonds of different denominations, to the amount of \$25,000. Bonds so prepared, with interest coupons attached, in the form required by the act, having been signed by the trustees, were presented to the defendant, who was president of said village, for his signature, who refused to sign such bonds and coupons. *Held* that a mandamus would lie to compel the defendant to sign said bonds and the coupons attached.

One who accepts an office under a village charter, in which there is a reservation of the right to amend, takes the office and becomes liable to perform all its duties, subject to the right of the legislature to amend the charter by imposing new duties upon the incumbent.

And although he is under no compulsion to continue to hold the office, with its additional duties, yet his continuance therein after the imposition of new duties, by an amendatory act, subjects him to the liability to perform them, and estops him from refusing to perform the duties thus imposed.

His performance of the duties of the office, after the going into effect of the new act, is an implied acceptance of the office with its new duties.

THIS is a motion for a peremptory mandamus against the defendant, who is president of the village of Saratoga Springs, to direct him, as such president, to sign certain bonds of said village and the coupons annexed, which bonds have been prepared by the trustees of said village, under the provisions of an act of the legislature, passed 21st April, 1869, entitled "An act to amend the charter of Saratoga Springs, passed May 26, 1865, and for the purpose of securing a supply of pure and wholesome water for the use of said village."

C. S. Lester, for the motion.

L. B. Pike and Wm. Hay, for the defendant.

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POTTER, J. The act of 1869 authorizes and directs the six trustees of Saratoga Springs, or a majority of them, to issue the bonds of said village, executed by them or a majority of them, and signed by the president of the village and countersigned by the clerk of the village, to the amount not exceeding \$100,000, which shall bear interest not exceeding seven per cent per annum, and payable at some time within thirty years from the sale thereof, such interest being paid semi-annually. The avails of said bonds to be used for the purpose of furnishing a supply of pure and wholesome water to the inhabitants of said village, and for the purpose of extinguishing fires therein. So many of the bonds as should be required for the purposes of said act, the said trustees were directed to deliver to the commissioners of construction therein appointed, who are the relators on this motion.

These commissioners, the relators, have called upon the said trustees of Saratoga Springs to deliver to said commissioners a portion of the bonds authorized by the said act, for the purpose of enabling said commissioners to carry out the objects and purposes of the act. It appears that on the 3d day of May, 1869, at a meeting of the board of trustees, regularly held, they appointed one of their number to prepare the form of a bond to be issued by them. An instrument was prepared, in obedience to such direction, bearing the form of what is called government bonds, with coupons attached; and afterwards, on the 8th day of May, then instant, at another regular meeting of the said board of trustees, at which the defendant was present, presiding, the form of a bond and coupons attached was presented for the action of said board of trustees, and was examined by them and by the defendant; and the said form was accepted and adopted without dissent expressed by any one of said board or by the defendant; and the said board of trustees then resolved to proceed forthwith and execute and deliver to the said commissioners of construction

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\$25,000 in bonds of the denominations of \$1000, \$500, \$200 and \$100. The so-called bonds were printed in the proposed form, to which all of the said trustees affixed their signatures, and they then were given to the village clerk, in the office of the said board of trustees, and in the presence of the defendant; and the said clerk was then requested to complete them according to the resolution of the board, which resolution prescribed the times of their payment, which times were within the said period of thirty years. That the only blanks in said bonds necessary to be filled by the said clerk were that of the year in which they should severally become due, and the day of the month of their date. The said bonds and coupons, as so prepared, were presented to the said defendant for signature in May last, with a request that he sign the same. The commissioners of construction mentioned in the said act have performed the preliminary duty of examining the sources for the supply of water, investigated the expense of different methods, and have incurred some expense therefor; and they show that before they can proceed further, it has become necessary for them to have the required bonds, to enable them to discharge their duties; and that a supply of water is greatly needed by the citizens of the said village, and that they are obstructed in carrying out the provisions of the law by the refusal of the said defendant, as president of the said village, to give the proper authentication of the said bonds, by his signature to such bonds and the coupons attached. The defendant interposes various objections to the performance of the acts required of him, which we proceed to notice. Though he does not deny his omission to sign the bonds at first, and that when called upon on the 22d of July, 1869, by one of the commissioners to obtain them, he informed him they were not ready, and that he did not know when they would be ready; yet he states that he did actually sign the bonds on or before 2 o'clock of the 26th day of July; but has not

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signed the coupons, and still declines to sign such coupons, for the reasons specified in his affidavit.

The defendant's first reason for the refusal was, that he was of opinion that the said bonds were not prepared as required by law; that he would sign no bonds or coupons annexed to them so as to make himself liable; nor, unless the bonds were such as the law required him to sign. In looking at the prepared form of bond and coupon, there can be no reasonable pretense of individual liability to the defendant by the execution of either bond or coupons annexed. So far as this was an objection it was groundless. If the bonds were not such as the law required him to sign, his objection was doubtless good. This is the real question in issue, and its determination is all that is to be decided. It is true, as he claims, that he had no right, though present, to interfere with the action of the board of trustees in fixing the form, date or amount of bonds to be issued; and, as he declares that he has always been ready and willing to sign any bonds the law required him to sign, we have but to examine the legality of the objections presented by him. The first objection of this kind is, that when the bonds were presented to him they were not fully filled out with the name of a payee. This objection is of no force; there was no law requiring the name of a *payee* therein. They were good without the name of a payee. The designation of bearer, which was in the bond, was sufficient to make them valid. 2d. The argument of the defendant in his affidavit as to the motives of the relators, or of any of them, in regard to the reasons for adopting the particular form of bond with coupons attached, presents no reason for his refusal to perform the act required. Whatever may be the motives that controlled one or all of the said trustees, the defendant was possessed of no power to control or regulate their action in that regard, and of course could not place his refusal to act upon that ground. The character of the duty which the act required

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should be performed by the defendant was not judicial; he possessed no power to judge of, or to direct, or to control it, or to refuse the performance of any official duty devolving upon him. If the paper presented to him for signature was such a one as is contemplated by the law, his only duty was to obey, and to execute it. This brings us to examine the only real question in the case: Was the instrument presented to him for signature such an instrument as it was his duty to execute, or, as comes within the meaning and intent of that statute? Must it be a perfect bond when presented to him for signature? If no other definition of a bond can satisfy the law than such as is in strict accordance with the technical common law definition of a bond, to wit, "an instrument under seal," still this is no objection that the defendant can interpose to the performance of his duty. The seal, if necessary, was not to be his private seal; it could only be the corporate seal of the board. There was no resolution, so far as it appears, that he should execute it by such corporate seal. There is no law requiring the instrument to be a perfect bond when it shall be presented to him for signature. His signature is only one of the preliminary steps in the progress of perfecting the bond; and it does not lie with him to obstruct the progress towards its perfection; it is only required to be a bond when issued to the commissioners of construction. *Non constat*, the trustees will not make it a perfect bond before it is delivered to the commissioners of construction. It is the legal duty of the defendant to aid them in carrying out the directions of the statute and in performing the preliminary steps; and it is no part of his duty to dictate or prescribe the order of this performance of their duties; nor can he refuse to perform his duties, so long as it appears that they have not transcended their powers. His duties call for the exercise of no discretion or judgment, when the trustees are thus acting. His name is of no other importance than as the evidence

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of authenticity required by statute. This signature doubtless was regarded by the legislature as a safe check or guard against over-issues of bonds, and perhaps for other reasons, that we need not inquire into; certain it is, they did not express the intent that he should control the action of the board of trustees. The only question in the case that I regarded on the argument, as casting doubt about the power of the court to enforce action on the part of the defendant, was as to the signature of the coupons attached to the said bonds. More reflection has removed that doubt. These coupons are a part of the bond; they are the token, or evidence to the holders, of the right to the amount of interest expressed upon the face of the bond, and which interest is an incident of the bond. The bond, as the statute allows, may draw interest at the rate of seven per cent per annum. These bonds, with their coupons, are nothing but the bond with interest, and together they represent no greater sum, and create no greater liability against the corporation, than if the coupons were not added. If these coupons were printed in the body of the bond, instead of at the bottom, and by the terms of the bond were to be canceled in their order as they became due, the defendant could have made no objection to the form of the bond, for with the form he has nothing to do or direct. If it was a bond, or was capable of being made one by the trustees, before delivery, it was his duty to sign it. If the bond had required but two signatures, one to pay the principal at maturity, and the other to pay the interest as it became due, it would still be a bond, varying only from the usual form of a common money bond in that regard. The principal and interest constitute but one bond, whatsoever may be the form. That the sums coming due for interest should be separately certified does not make it any less a bond. Governments and corporations in the march of intelligent improvement have adopted new forms of legal obligations, more convenient, more suitable, and

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better adapted to the wants and necessities of the age in which we live; and by common consent the universal cognomen of such obligation now given them, is bonds; they are declared to be bonds by statute, and they constitute the great proportion of commercial moneyed capital of the country. Government bonds differ but in the slightest respect from the instruments in question. I think the criticism upon this obligation, if the defendant had a right to make it, is not sufficient for its condemnation.

The only remaining argument of the defendant, that I regard necessary to notice, is that the act in question has been passed since his election to the office he holds, and that it imposes on him new and onerous duties without compensation; that his labor and services are private property which cannot be thus taken from him. The act in question is an amendment of the charter of the village, under which he was elected to the office he holds. The right and authority to amend it was in the legislature; the amendment, when made, becomes a part of the original act. The defendant accepted his office and became liable to perform all its duties, subject to the right of amendment of the charter by the legislature, imposing new duties. The charter, before amendment, makes it his duty "to do such acts and things as may be proper for him as president of the village." The act of 1869, which relates to the public interests of the village, becomes mandatory to him when it calls upon him to execute such bonds as a majority of the trustees of said village are directed to issue for the purpose therein specified. He is under no compulsion to continue to hold the office with its onerous duties, but his continuing to hold the office after the imposition of new duties by the act in question, subjects him to the liability to perform them, and estops him from refusing to perform the duties thus imposed. His performance of the duties of the office

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after the going into effect of the new act is an implied acceptance of the office, with its new duties.

The whole case is briefly summed up in this: The new act authorized and directed the six trustees of the village, or a majority of them, to issue bonds for the purpose specified, to be signed by the president. The exercise of this power by the trustees was the exercise of a *quasi* judicial power, limited only by the amount of bonds to be issued and the time they should run; it directed nothing as to the form or manner of their issue. By the well known rules and principles of construction of statutes, all things not expressed in the statute, but necessary to the carrying it into effect as needful or requisite to attain the end and object of the statute, is given by implication; and whenever the statute imposes a duty, the common law always provides the means of enforcing it. I have not been able to see, in the objections interposed by the defendant, a sufficient reason for his refusal to sign the bonds in question, which I hold includes the attached coupons.

The writ of mandamus may therefore issue.^(a)

[SCHENECTADY SPECIAL TERM, August 10, 1869. *Potter*, Justice.]

(a) Affirmed at the SARATOGA GENERAL TERM, November 9, 1869. *Booth*, *Boekmans* and *Potter*, Justices.

NELSON vs. BLANCHFIELD.

So far as the facts upon which an order of arrest, in an action of tort, is based are concerned, the court will, in ordinary cases, allow the order to stand, and abide the trial of the issues. The truth or falsity of such facts should never be decided on a motion.

But where, after the perpetration by the defendant of certain alleged frauds, in the purchase of stock for the plaintiff and refusing to transfer the same to him or to refund the money advanced for such purchase, there was a settlement between the parties, and the plaintiff accepted the defendant's note for \$700, 100 shares of a specified stock, and a due-bill for 200 shares of the same stock, giving a receipt stating that it was a "receipt and settlement for all claims" which he held against the defendant; *Held* that this was a condonation of the tort, and a waiver of the plaintiff's right to arrest the defendant; and that it was a proper case for vacating the order of arrest, on motion.

THE plaintiff, on or about the 7th day of October, 1868, employed the defendant, who had represented himself to the plaintiff as a "mining stock broker," and a member of the New York Mining Stock Board, to purchase for him, for cash, two hundred shares of Combination Silver Mining stock, and for that purpose gave him \$1200, which was more than sufficient, at the time, to purchase said stock. The defendant bought the stock through some other person, he not being a member of the Board of Mining Stock Brokers, but refused to surrender or deliver the same to the plaintiff when requested so to do, upon any terms, notwithstanding he was offered payment of any amount he might claim to be due him. Before the defendant thus refused to give the plaintiff the stock purchased for him and with his money, the plaintiff, at the solicitation of the defendant, on the 31st day of December, 1868, lent him \$500 to pay an amount the said defendant stated he had borrowed on the 200 shares purchased for the plaintiff, which the defendant swore he afterwards repaid. The defendant also alleged that he at the same time delivered to the plaintiff a promissory note for \$700, a due-bill for two hundred shares of Combina-

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tion Silver Mining Company stock, and one hundred shares of Combination Silver stock, and that the plaintiff received the same in full accord and satisfaction of all the matters before mentioned, and of all claims by said plaintiff against the defendant, for or on account of said matters, subject to any future accounting, and thereupon signed and delivered to the defendant a paper in words and figures following:

“New York, December 31st, 1868.

Received from E. F. Blanchfield, note for seven hundred dollars, due-bill for two hundred shares of Combination Silver stock and one hundred shares of Combination Silver stock. The above being a receipt and settlement for all claims which I hold against him, the said E. F. Blanchfield.

Due bill or call, not transferable. M. L. NELSON.

Act. to be rendered.”

The defendant alleged in an affidavit, that said purchases, sales and transactions were the only transactions of any kind then pending between the plaintiff and defendant; that said plaintiff had never requested or demanded of the defendant any further or other account of said transactions; that said note had never been presented to him for payment; that the plaintiff still holds said call or due-bill, and has never demanded the said two hundred shares of stock which it was agreed thereby to deliver, and that the two hundred shares of stock set forth in the plaintiff's first cause of action are the same two hundred shares mentioned in said paper, and are the only two hundred shares of stock for which the plaintiff can have any claim against the defendant; and that on a full and fair accounting of all said transactions, the plaintiff is indebted to him, and has no claim against the defendant for the amount of said note, or said shares of stock, or for any other matter whatsoever.

The plaintiff alleged, in his complaint, and an affidavit, that the defendant failed and refused subsequently either

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to give the plaintiff his stock, or to repay him the money he had advanced. Upon this the plaintiff brought suit against him, and had him arrested and held to bail. Subsequently a motion was made to vacate the order of arrest, and upon this motion being denied an appeal was taken by the defendant.

Horace Graves, for the appellant. I. The complaint joins two causes of action, to one of which the remedy of arrest can be applied, and to the other of which that remedy cannot be applied. The order of arrest should have been vacated on that ground. (*Lambert v. Snow*, 9 Abb. 91. 17 How. 517. *McGovern v. Payn*, 32 Barb. 83. *Smith v. Knapp*, 30 N. Y. Rep. 581.) 1. In the second cause of action the complaint does not set forth that the money therein mentioned was to have been used in a *fiduciary capacity*, and it does not charge the defendant with representing that it would be so used, nor that it would be used for any specific purpose. It would not be inconsistent with the allegations of this complaint to suppose that the stock had been "turned," for the sole benefit of the defendant; that the loan of \$500 was to pay off the defendant's private debt; and that for such a debt the stock had been hypothecated. That view of the case is strengthened by the agreement to return the money the next day, and by the affidavit of the defendant. The loan was not an advance of money from a principal to an agent, but it was an ordinary accommodation loan from the plaintiff to the defendant, in an independent capacity, and it has been repaid. (*Stoll v. King*, 8 How. 298. *Goodrich v. Dunbar*, 17 Barb. 644.) 2. This cause of action, in the strict meaning of the term, would not sustain the order of arrest, the grounds of which (if there are any) are the allegations of fraudulent representations. Those allegations are no part of the cause of action which is on contract, and they are improperly incorporated into the complaint since they are

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extrinsic to the cause of action. (*McGovern v. Payn*, 32 Barb. 83. *Crandall v. Bryan*, 15 How. 48. *Smith v. Knapp*, 30 N. Y. Rep. 581.) The order of arrest cannot be said, in the words of the decisions, to "apply" to this cause of action on account of the fraudulent representations; the representation that the defendant was a broker, or a member of the mining board, however false it may have been, would not have induced the plaintiff to make a loan of the character which we have shown this to have been. Such a representation is not fraudulent within the meaning of the law; it is not material to the transaction. (*Green v. Gordon*, 4 Scott's N. B. 13. 3 Man. & G. 446. *Taylor v. Fleet*, 1 Barb. 471.) 3. If there is any ambiguity as to the nature of the cause of action, the court will determine, not what cause of action the plaintiff has intended to set forth, but rather what cause of action he must rely upon for recovery. (*Peel v. Elliott*, 7 Abb. 433. 28 Barb. 200. 16 How. 485.) 4. Not only must the order of arrest extend to all the causes of action, but the grounds of arrest as involved in all the causes of action must be the same, otherwise the order of arrest might be set aside with reference to one cause of action and stand with regard to the others, thus necessitating dissimilar judgments and dissimilar executions in the same action. The order of arrest states that the case is "one mentioned in section 179 of the Code." (9 Abb. 91. 17 How. 517. 32 Barb. 83. 30 N. Y. Rep. 581.)

II. 1. The plaintiff waived any right to arrest the defendant that he might otherwise have had, by accepting the defendant's note in settlement of all the transactions which were carried on between the plaintiff and defendant up to the 31st day of December, 1868. The note has never been returned, nor has the plaintiff ever offered to return it. In fact it does not appear, even from the plaintiff's affidavits, nor from the complaint, that the note was due

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when this action was begun, nor that it is now due. (*Shipman v. Shafer*, 14 *Abb. Pr.* 449. *Merchants' Bank v. Dwight*, 13 *How.* 366. *Alliance Ins. Co. v. Cleveland*, 14 *id.* 408.) 2. At the time of accepting the said note, the plaintiff also accepted, in settlement, one hundred shares of the stock of the Combination Silver Mining Company, and a due-bill or call for another one hundred shares of the stock of said company, and thereby waived all right to arrest the defendant; inasmuch as he, the plaintiff, with full knowledge of the fraud, made and accepted a settlement of the very matters in which he claims to have been defrauded. (25 *N. Y. Rep.* 103.)

III. After the 7th day of October, 1868, all transactions between the plaintiff and defendant were on joint account. The parties to this action were copartners from that time, and consequently the form of the action should have been different, and the remedy of arrest ought not to have been resorted to. (*Cary v. Williams*, 1 *Duer*, 667.)

IV. In respect to the alleged fraudulent representations, and the alleged conversion of stocks and money, the preponderance of evidence is with the defendant. He denies, absolutely and unqualifiedly, the charges of the plaintiff, and other circumstances unite to make the allegations of the plaintiff appear improbable. (*Allen v. McCrasson*, 32 *Barb.* 662. *Brodsky v. Ihms*, 25 *How.* 471; 16 *Abb. Pr.* 251. *Mecklin v. Berry*, 23 *How.* 380.) The improbability of those allegations appears also from the fact that all the stock which was purchased was in the possession of the defendant for a very short time only. Mr. Partridge held it till he failed, when it went in with his assets, and consequently it is impossible that the stock should have been converted by the defendant. Besides, the plaintiff was indebted to the defendant at the time of settlement aforesaid.

V. The plaintiff ought to have been put on his guard.

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by the circumstances. Under such circumstances he was bound to make inquiries as to the truth of the allegations of the defendant. He could readily have informed himself, and neglected to do so, and is remediless. (*White v. Seaver*, 25 Barb. 236; 28 N. Y. Reps 110. 2 Pars. on Cont. 773, 5th ed., and cases cited, as follows: *Moore v. Turbeville*, 2 Bibb, 602; *Saunders v. Hatterman*, 2 Iredell, 32; *Farrar v. Alston*, 1 Dev. 69; *Falton v. Hood*, 34 Penn. Rep. 365.)

Sullivan & Bracken, for the respondent. The decision of the court at special term, denying the motion to vacate the order of arrest herein, should not be reversed.

I. Because the defendant, in moving to vacate the order of arrest, moved in part upon the plaintiff's affidavits for the arrest, thereby admitting them to be true, and by so doing bound himself to abide by the facts as therein set forth. (*Lovall v. Martin*, 21 How. 238. *Hathorne v. Hall*, 4 Abb. 227.)

II. The right to arrest the defendant in this action is derived from its very nature, and to vacate the order would be virtually trying the case. The whole object of the defendant is to show by his affidavits that no cause of action exists, and his desire is to try the cause upon affidavits, which is not allowable. (*Solomon v. Waas*, 2 Hilt. 179.)

III. When the facts constituting the cause of action, and the facts authorizing the arrest, are identical, the order of arrest will not be set aside, on the merits, unless the defendant clearly makes out such a case as would call on the judge, at the trial, either to nonsuit the plaintiff or direct a verdict for the defendant. (*Barrett v. Gracie*, 34 Barb. 20. *Levins v. Noble*, 15 Abb. 475.)

By the Court, CLERKE, P. J. As to the facts upon which the order of arrest was based, and which constitute the gist of the action, we would, in ordinary cases, allow the

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former to stand and abide the trial of the issues. Their truth or falsity, in an action of tort, should never be decided on a motion. But, in this case, after the perpetration of the alleged frauds, there was a settlement between the parties; the plaintiff accepting the defendant's note for \$700, 100 shares of Combination Silver stock, and a due-bill for 200 shares of that stock. This was a waiver of his right to arrest the defendant, and a condonation of the tort.

The order should be reversed, with costs.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland and Cardozo, Justices.*]

In Memoriam.

JAMES T. BRADY, Esq.,

A DISTINGUISHED MEMBER OF THE BAR OF THE CITY OF NEW YORK, DIED,
AT HIS RESIDENCE IN THAT CITY, ON THE 9TH OF FEBRUARY, 1869, IN
THE 53D YEAR OF HIS AGE.

At a meeting of the Bar, held in the court-room of the Supreme Court, General Term, in the new Court-House, on the 13th day of February, 1869, JOHN E. BURRILL, Esq., from the committee by whom it was convened, called the meeting to order and said :

Gentlemen—We have gathered here this morning for the purpose of paying our tribute of respect to the memory of our professional brother, JAMES T. BRADY. In common with thousands of his personal friends and fellow-citizens, we have taken part in his funeral ceremonies. We meet now, as his professional brethren, for the purpose of showing the estimation in which he was held by the Bar of his native city. I beg leave to nominate as your presiding officer on this occasion a gentleman who was one of his longest and most intimate friends—a gentleman who has occupied a judicial position in this city and State for a longer period than any other gentleman now on the bench. I nominate as your presiding officer, the Honorable DANIEL P. INGRAHAM, Justice of the Supreme Court of this State.

Upon Judge INGRAHAM taking the chair, the following gentlemen were appointed Vice-Presidents:

HON. LEWIS B. WOODRUFF, Judge of the Court of Appeals.

HON. SAMUEL BLATCHFORD, United States District Judge.

HON. T. W. CLERKE, Justice of the Supreme Court.

HON. JOHN M. BARBOUR, Chief Justice of the Superior Court of the city of New York.

HON. GEO. C. BARRETT, Judge of the Court of Common Pleas.

HON. JASPER W. GILBERT, Judge of the Supreme Court.

HON. JOHN K. HACKETT, Recorder of the city.

HON. GIDEON J. TUCKER, Surrogate of New York.

HON. S. B. GARVIN, District Attorney.

HENRY NICOLL, Esq.

On motion of Mr. C. A. Rapallo, the following gentlemen were appointed Secretaries:

HON. HENRY ALKER,

WM. C. TRAPHAGEN, Esq.,

H. W. ROBINSON, Esq.,

SIDNEY WEBSTER, Esq.,

ABRAHAM R. LAWRENCE, Esq.,

ROBERT D. HOLMES, Esq.

Mr. Augustus F. Smith offered and read the following resolutions:

Resolved, That we, the members of the New York Bar, yield with profoundest grief to the omnipotent fiat which, in the full vigor and maturity of his great powers, has called from his sphere of active usefulness amongst us, our much-beloved friend and associate, JAMES T. BRADY.

Resolved, As the sense of his professional brethren, that in his decease, the social circle has lost a contributor to its enjoyments, of inestimable value; the bar has lost its most brilliant ornament; and society at large has lost a member whose excellence of heart, combined with his rare gifts as an orator and attainments as a jurist, renders his death a deeply-afflicting dispensation.

Resolved, That in the admirable traits which distinguished the character of our lamented brother, jurisprudence is supplied with its best practical vindication. They show that in the mind adapted by nature to great purposes, its study and practice produce the noblest development—a champion of truth and justice, learned, wise and persuasive; a defender of innocence, reliable and unflinching; a consoler of poor, erring mortality, in its hour of trial—second only in the benignity of its influences, to Faith and Piety.

Mr. CLARENCE A. SEWARD said: *Mr. President and Gentlemen of the Bar*—The death of a stranger in our household, be he but a sojourner for a night, always occasions a softened voice and tread, and

always clothes us, if but for a moment, with sadness. Doubly great is our sorrow when the stern old reaper silently comes, and remorselessly binds in his sheaf our familiar, best-beloved, and most intimate friend, companion, brother. When that blow falls, submission seems to be the only resource, and silence the only eloquence; for beneath the shadow of a great affliction one's heart sits dumb.

Yet there are occasions when the departed claims, for the last time, his identity in the places which once knew him so well; when it seems to be proper that even great personal sorrow should find an utterance.

I cannot permit my brother, JAMES T. BRADY, to pass within the tent whose green veil never outward swings, without expressing, in a few words, my recognition of the loss of an affection which he always so openly manifested and avowed. That affection was ever fresh, ever present, and knew no diminution. For twelve years did our intimacy daily, nay, almost hourly, ripen in every possible phase of professional and social life. So earnest and so perfect was it in its every manifestation, that I almost learned to believe that which he so often asserted, that the highest, purest, and most unselfish of all earthly affections, is man's love for man.

You, my brethren, who knew him longer, as the skillful, brilliant advocate, will pay just tribute to his intellect, which seemed ever to renew its strength at some unseen fountain, and to his silver speech, which produced unrivalled effect, both in pathos and in mirth. Therefore I will not speak of those. It is of the chief characteristic of the man—of the chief characteristic of his heart, for that stamps the man—that I wish now to speak.

On an occasion similar to this—and on none did the characteristic to which I allude more plainly manifest itself—on the occasion of the death of Daniel S. Dickinson, he said: "Like you, I honor greatness, genius and achievements; but I honor more those qualities in a man's nature which show that while he holds a proper relation to the Deity, he has also a just estimate of his fellow-men, and a kindly feeling towards them. I would rather have it said of me, after death, by my brethren of the Bar, that they were sorry I had left their companionship, than to be spoken of in the highest strains of gifted panegyric." This, I think, truly indicates the character of our deceased brother. He valued more a recognition of his worth as a companion, as a friend, than he did a recognition of the abilities which had been given to him. This recognition we all know that he obtained; and that his companionship was prized, the instantaneous gathering of sad faces on Tuesday last—the

crowded cathedral, with its beautiful floral offering of cross and crown, and harp—this sad assembly here to-day, where many an eye is heavy because it long hath wept—all attest.

I think we also know that that which drew us all towards him was, what seems to me to have been his chief characteristic—his tender consideration for others; and this, by the controlling law of his nature, was invariably manifested towards all, without distinction of rank or person. In the height of professional contests; in the bitterness of so much of political life as he permitted himself to enter; in all the jealousies of social intercourse, he never for a moment forgot due and perfect consideration for those around him. At the Bar, it was always manifested towards his associates; and from his lips fell the first recognition of ability, the first congratulations upon success. I never knew him to be engaged in a case with others that he did not publicly acknowledge his obligations to his associates, and commend their efforts as of more value than his own.

The report of his argument on the trial of the officers and crew of the schooner *Savannah*, where he was surrounded by many as associates, and by some as opposing counsel, so well illustrates this trait that I may be pardoned for recalling it. He there said: "I have not a word to say against my friend, the district-attorney, (Mr. E. Delafield Smith,) for whom I feel a respect I am always happy to express; nor against his learned associate, Mr. Evarts, for whom I have a high regard; nor our brother Blatchford, who always performs the largest amount of labor with the smallest amount of ostentation. I was happy to hear Mr. Mayer on the law of the case. My learned friend, Mr. Lord, in his remarks, so clear and convincing, called attention to the lawfulness of privateering. I rest my argument, also, on the fact to which Mr. Sullivan so appropriately alluded. My friend, Mr. Larocque, has called attention to cases that might happen; and I shall not mar his argument nor his example by repeating them, or saying any thing in addition."

This, I repeat, was the prominent characteristic of him whose heart made the appreciation of his companionship of more value than a recognition of his intellectual force. There was no jealousy in his large nature; nor timid apprehension of being overshadowed by the researches or the abilities of others. But to all he gave full opportunity, and to all desert full meed of praise. I doubt if one unkind word has a lodgment in the memory of any one of us. I know that we all remember a thousand utterances of genuine, warm, heartfelt sympathy in professional endeavors. Towards the younger members of the Bar was this consider-

ation always especially manifested. He gave to them the support of his strong hand, and himself held it in position till the support was no longer needed; but it was his tender consideration for others that induced him so to hold his hand that no one else could see it. His language to me always was: "Open the case; use all that either of us have suggested or discovered. The other side will probably give me enough to do to answer their arguments."

His fertile brain furnished suggestion, argument and strategy; but none ever heard, from him, of the debt thus created. Generously he gave to his associates all that he possessed; and he found his reward in the giving.

Courtesy, the offspring of consideration, was also his; and it returned with interest every kind, appreciative word, and it seemed so to encase him that harshness could never get behind it, to make a scar upon his memory. And of him it may be truly said, reversing the words of Sir Thomas More: "He wrote the injuries that men did to him in dust; their good deeds he engraved upon marble."

With such a character as this, among the associates of his daily life, it is easily to be seen that among children there would spring up, upon the instant acquaintance, a mutual love; and by them there was always strewn along the pathway of his life the offerings of a child's affection. The murmur of their gentle voices was music in his ear; and the anthem commenced by them on earth—which he had so lately said to Mr. Gerard would be the first to fall upon his ear in the world beyond—has already greeted the spirit of our brother on its entrance to its final home. It was on the affections of these little ones that he based his hope for the perpetuity of that church in which he always believed, and which at last received him into its bosom. He once said: "There is one reason why the Catholic church will always exist, and grow stronger, and it is this: Every night there are thousands of mothers who teach their little children to pray for the welfare of some little brother or sister who has gone before; and the belief that their prayers on earth can aid the souls of the dead, which our church always teaches, is so pleasing to these little ones, that they receive it with gratitude, and cling to it and to the church which so instructs them; and so that church will always be replenished." Consideration for others is readily to be perceived as the basis of this opinion.

But, in conclusion, and borrowing again from his own graceful utterance: "When once the feet have fallen upon the threshold with the certainty of welcome, it is the saddest thing in nature to feel that they

can never pass that threshold more." There are many thresholds here where his feet were ever busy weaving anew the web of social sympathy, where sorrow reigns supreme to-day—sorrow that his advancing footsteps will be heard no more—sorrow that his genial greetings are hushed forever. It remains for us only to write his epitaph: "He was faithful!"—faithful to his abilities, his opportunities and his friends—faithful, above all, to those to whom he was father and brother, both in one. In the language of one of those poets whom he loved so well:

"If the spirit ever gazes
From its journeyings back;
If the immortal ever traces
O'er its mortal track;
Wilt thou not, oh, brother, meet us
Sometimes on our way,
And in hours of sadness greet us,
As a spirit may?"

I move, sir, the adoption of the resolutions.

MR. FRANCIS B. CUTTING said: *Mr. President and Gentlemen of the Bar*—Though laboring, this morning, under severe indisposition, the loss that you, and I, in common, have just sustained is such as to induce me, notwithstanding, to attend this meeting for the purpose of testifying, with you, the respect, the reverence and the affection I had for my friend. It is not my purpose to detain you by any remarks beyond expressing the great grief that I, in common with you, feel in the calamity that has befallen us. I have known Mr. BRADY from his very earliest manhood. I have followed and watched with interest the progress that he made, professionally, from the commencement of his career until he had obtained the highest honors of the Bar. He had entwined himself very closely around my heart; and the separation has caused a pang greater than I have before felt, unless it was when one of my own immediate family had been taken from me. Endowed with a noble, a generous, a magnanimous disposition, nature had lavished upon him her rarest gifts. Intellectually and morally, all the qualities that could adorn a man had been bestowed upon him, and nobly he used them—nobly he exerted them. In the plenitude of his powers, in the meridian of his manhood, in the zenith of his fame, it has pleased Divine Providence to take him from us. Long, and forever—until each of us shall be gathered unto his fathers, will he live fresh in our hearts, and be remembered as our most dearly esteemed, respected, and beloved brother.

Mr. JOHN McKEON said : *Mr. President*—This solemn scene recalls to my mind an expression of our deceased friend, on an occasion similar to this, when we were engaged in paying the last tribute of respect to a distinguished member of the judiciary : “Of him who so eloquently has often spoken of our dead brethren, who of the living can speak in terms such as he commanded.” For myself, I confess my inability to do that justice which his memory demands at our hands. I come as the humblest of you, to cast my garland on the marble home in which lie entombed the remains of him who, while living, in common with you, I admired, and in death sincerely deplore.

Mr. BRADY was known to me from his boyhood. Born in this city, his life has been passed amongst us. His father, well trained in classical attainments, imparted to his son much of that information, on which was reared his successful career. At an early age he evinced the intellectual power which in after life won for him a national reputation. His ambition was to be a lawyer. He had an elevated idea of the mission of the profession. He did not view it as a mere means of the acquisition of wealth. He looked upon its honors as far more valuable than all the “gold of Indus”—far above the transitory reputations won in high political positions. For the exercise of the duties required by that profession, he brought wonderful advantages. His peculiarly engaging personal appearance was one of his great gifts. In addition to this, his mental capacities were of no ordinary character. He was deeply versed in the philosophy of the law. He was not a mere citer of precedents—*Cantor formularum*—so denounced by Cicero, but his law was drawn from the deep wells of profound erudition, and of reason. His judgment was clear and careful; his knowledge of human nature was searching, and you have frequently seen it developed in his examination and cross-examination of witnesses. To these must be added his urbanity of manner, and above all his eloquence, which was accorded by all to be of that order that the same words which are inserted under the bust of Erskine may with truth be said of Mr. BRADY : “*Nostra eloquentiæ forensis facile princeps.*”

This gift of eloquence is not given to all. The power to sway the will and judgment of our fellow-men—to hold as if by magic spell, the intellect and the heart of those whom we address, was conferred on our deceased brother. Descended of a Celtic stock, he partook of the fervid imagination peculiar to the race.

He was indeed a proud representative of that Homeric race from which he sprung—which in the earlier days of our jurisprudence, gave us an

Emmet to adorn our Bar, and in later days descendants of that race, who have proved themselves not unworthy of the fame of their predecessors. The love of the arts, of all that refines, whilst it elevates, humanity, which characterize the Celt, was developed in BRADY. But his imagination was tempered and regulated by a severe judgment and taste. He possessed in a high degree a natural magnetism of manner, and subtle power of sympathetic feeling which bound his auditors to him, and held them captive to his appeals. Who will ever forget that peculiar manner of his, we all have felt and none can describe. "It was evanescent as the fragrance of the rose." Yet there was one peculiarity of his eloquence which cannot be passed over. That genial warmth which came bubbling up from his own large heart was discernible in every sentence. Whilst we saw the torrent rolling before our eyes, sweeping in its resistless power every argument of his opponents, we at the same time saw that wit for which he was distinguished throwing its brilliant sparks across the stream of his most serious argument.

We may refer to the period of his introduction to the Bar of this city as an epoch in its history. In looking back on the past, we see rising before us George Wood, treading with no uncertain step through the labyrinths of the law of real property; Daniel Lord following, with his legal eye, commerce over the long and dreary waste of waters; David Graham, the younger, and Ogden Hoffman, standing in full panoply of intellectual power before our criminal tribunals. Into the lists where stood these proud knights, young Brady sprang, ready to contend with the mightiest of them. How well he contended, many of you well remember; and the honors now paid to his memory are justified by the triumphs he has won. Mr. BRADY, with the exception of filling the office of the legal adviser of the municipal authorities, never occupied any public office; yet he was more of a public man than any one amongst us. On the great and momentous questions which have agitated the country for the last thirty years, his voice has always been heard, and no man can say but that, on every occasion when his advice was given to his countrymen, it was prompted alone by a deep sense of responsibility to the interests of his country. No motive of personal advancement, no venal consideration of gain, was ever ascribed to him. Though we might differ with him as to his opinions, all agreed that they were dictated by the highest devotion to honorable principle.

No man was ever more admired by the masses of our people than Mr. BRADY. The scenes which have been enacted before our eyes within the

past few days, are proof of how he was beloved. No herald was necessary to summon the populace to his funeral rites. When it became known that he was dead, this great metropolis stood shocked. His brethren rushed into your court-rooms to express their grief. The immense throng which crowded that old cathedral, in whose vaults he publicly, years since, expressed a wish to be entombed, this vast assembly of his grieving brethren of the Bar, all loudly proclaim the high regard in which, when living, he was held, and the sincere regret with which his loss is deplored.

Standing by the urn which contains his ashes, from which arises the perfume of his manly qualities and his genial nature, let us not forget the lesson his life teaches to our profession, that its highest rewards may, as was said of Erskine, be obtained without the sacrifice of honor or consistency.

Mr. JOHN GRAHAM said: Our loss is almost beyond computation. We bow with submission to this afflicting bereavement. We all acknowledge its weight. We are none of us presumptuous enough to question, or repine at, its wisdom. While we pour forth our tears, we do not mourn as those who are unsustained by grateful reflections or pleasing reminiscences. The obsequies of our departed brother are over. We have had the melancholy gratification of following his remains to their long, last home. We have seen his body committed to its mother earth, honored and consecrated by the most sacred and exalted rites of his church; the flight of his soul has been succeeded by her petition that he soon may, and the expression of her belief that he inevitably will, become an inmate of those mansions not made with hands, and eternal in the Heavens. All that is now left to us of him is his memory, and we are here convened to rear to it a monument, though impalpable, yet enduring, "*Monumentum ære perrennius.*"

To epitomise the life of such a man—to present the rich endowments of his mind, the sublimating qualities of his heart, and all the commendable elements of his character—within the range of condensation, is to me an absolute impossibility. The career of such a man demands both the pen and the tomes of the biographer. It is not the language of adulation to say that so numerous were his virtues, and so countless were his claims upon our admiration and esteem, that it would be easier to tell what he was not than what he was. Take him for all in all, we shall not soon look upon his like again. He was possessed of

"A combination, and a form, indeed,
Where every god did seem to set his seal,
To give the world assurance of a man."

In his domestic relations, as a son and a brother, he was without fault and without blemish. Bereaved of his parents at an early period of his life, he became, and long continued to be, the head and protector of a fatherless and motherless family. His devotion to that family is his highest panegyric. As they divided with him his obscurer and less attractive, so they rose with him, and became the sharers of that happiness which attended his brighter and more prosperous days.

As a lawyer, he was great in every department of his profession. Every branch of it witnessed and acknowledged his ability; and it would be unjust to his memory to assert that he shone in one sphere of it more than another. I have ventured to think that what we call the science of the law is but the application of the religion of the great Creator to the administration of the affairs, and the settlement of the concerns, of this life. If to be versed in the great principles of moral rectitude, which are identified with and attached to that system of morality of which the divine Workman Himself is the author, is to be a great lawyer, then was our deceased brother a great lawyer. The emergencies and exigencies of time and locality may require the interference of a secular legislature, but to be familiar with those great principles I have adverted to, constitutes the chief excellence and the greatest qualifications of a true lawyer.

As a scholar, none will dispute the claims of our deceased brother. He was descended from a father who was well known as one of the most finished private scholars of his day. Probably the largest part of the patrimony falling to him from that father, in addition to a clear and good character, was the finished education conferred upon, and communicated to, him.

In all the relations of life, he was a perfect and polished gentleman. He was never known to compromise, or entirely put off or repudiate, that character. In the performance of professional duty he was ever ready. He was signally and strongly marked by quickness of perception, by the unusual rapidity of his tactics, and by the uniform soundness, and almost infallibility, of his judgment. As a speaker, he enjoyed the sobriquet of being the Curran of this Bar. Every weapon contained in the armory of the true rhetorician he could command to his use, and wield with the utmost skill and dexterity. Reasoning, wit, sarcasm, irony, invective, pathos and elegance were all his. In his

disposition he was ever genial, ever steady; he neither provoked nor did he nurture animosities. Throughout his whole life he was a great respecter of religious things, and his reverence for the Bible was on every occasion acknowledged.

I had the honor, a number of years ago, of being associated with him in a sister city, the capital of our nation, in the case of a client whose defense involved the consideration of the sanctities attending the existence and purity of the marriage relation. On that occasion I had the honor—and it was an honor which I am glad belonged to me—of introducing into a court of justice the precepts of the Bible. I planted my foot upon it as the great law. It was supposed that as marriage was a heaven-created and heaven-descended institution, the best way to ascertain the sanctities environed in that relation was, by resorting to the canons of the Great Being who had instituted it. The introduction of the Bible into court, on that occasion, met the approval of all my associates, and of none more feelingly and sincerely than of the departed brother whose memory we have here met to honor and to respect. In the exercise of one of his greatest qualities—his wit—he was always judicious, and never—if ever, certainly not intentionally—wounding. I remember on one occasion, nearly twenty years ago, being present in a criminal court, where he was engaged in the defense of a criminal accusation. I happened to be present at the very time the vice was produced in court, and from the very terror which attended the exhibition of the vice to the jury, it was perfectly apparent that the mere presence of that piece of proof was almost fatal to the prospects of his client. I remember the rebuke he administered to the attempt to overawe or improperly influence the jury by its production; and when it was stated to him by the prosecuting attorney of the county that the vice had not yet been offered in evidence, the retort he made completely neutralized and destroyed the effect of the exhibition. “I not only object to the introduction into the case, but to the very exhibition in the presence of the jury, of the vices of our learned and worthy District-Attorney.”

His sociability was a marked and prominent element of his character. He had the greatest capacity for adapting himself to the society in which he moved. He could be the companion of the old or the young; his transitions from grave to gay, and lively to severe, were probably happier and more successful than those of any other person within the pale of our knowledge. Another trait of his character stood forth—it was his charity. Probably no man who has flourished in the ranks of our profession, in our

time, ever distributed, in the way of money and professional services, the same amount of charity as our beloved brother.

Poverty was always, to him, a welcome client; and even when he was called upon to represent the wealthy, he never did himself the justice to sufficiently tax their abundance to compensate his exertions in the discharge of professional duty.

But, alas! his capacious head, his broad, imposing brow, his countenance, the index to and mirror of his heart, are never more to be seen among us.

To the rising members of our profession this visitation appeals with peculiar force, and addresses itself with well-timed and apposite instructiveness. However death may invade and thin out our ranks, the affairs of this life require that these places should still be filled. Some one is demanded to fill the void which has been created by the departure of our beloved BRADY. Who is he to be? Who shall he be? Who, among the rising members of our profession, are girding on their armor for the contest which is before them? Who among them are devoting their days and nights to study and to toil, ransacking the rich storehouse of legal and general knowledge, to gain to themselves the wisdom of those who have already passed from the sphere of their worldly usefulness? The duties which awaited our beloved brother, had he lived, still remain. Who, among the rising members of the profession, are developing and adding to their stock of strength, so as to qualify them for the assumption and discharge of those duties? Let all of us, young and old, extract from this visitation its appropriate moral. While it admonishes us of the uncertainty and unreliableness of human life, let it also resolve us, as was the resolution and practice of our departed brother, never to lower, but to exalt, the science we profess, and to raise higher and still higher the standard around which we gather. Let us emulate his virtues; let us imprint upon our recollections his noble example, and long keep his memory green in our souls, looking to that hand which has smitten us to assuage the pain consequent upon its own blow.

“Remembering, Heavenly Father,
That sorrow touched by Thee
Grows bright, with more than rapturous ray,
As darkness shows us worlds of light
We never saw by day.”

E. DELAFIELD SMITH, Esq., said: *Mr. President*—I know well that occasions like this are best adorned by those who bring to them the dignity of years, the lustre of learning, the glory of renown. And I rejoice that while the scythe of death has been busy in our midst, peers of our illustrious friend still remain to honor his obsequies. Yet it must be acknowledged that JAMES T. BRADY possessed characteristics extraordinary in degree if not in kind, calculated to inspire, and to justify, in younger and humbler members of his profession, a desire to press forward, and stand among the foremost at his bier.

Juniors and even juveniles at the bar; aspirants upon the very threshold of manhood; youths still lingering in academics and schools; and little children, tender as those our Saviour caressed, were as dear to his presence as the most accomplished of the crowned intellectual princes with whom it was his pride to cope in the forum, and his delight to mingle in social festivities.

To all who approached him, in his life, rang out the welcome of his cheerful voice. By its dying echoes, all alike are summoned to his tomb. The greatest who kneel there must make room for the least. If, at the home so lately his, where we looked upon his face for the last time; if, from the coffin, which was buried in flowers before the cold earth had leave to press it, his eyes could have opened and calmly viewed the scene, no floral harp, no cross nor crown, however beautiful or elaborate, would have won a sweeter smile than the simplest wreath that struggled for its place in the general profusion.

His kindness and courtesy were universally bestowed; and in view of this, it is remarkable that they were so singularly acceptable and flattering to every individual who came within their reach. But they were a matter of heart, not manner—too respectful to offend, too genuine to be resisted. As the generous light of the sun may illumine half the world, yet the rays that fall on us seem peculiarly our own; so the genial glow of his kindness cheered us all, and yet each felt himself the special recipient of his favor.

There were times, however, when his generosity became marked and demonstrative. It was interesting to observe with what judgment and taste it even then was guarded and directed. In the celebrated trial of the "Savannah Privateers," to which a preceding speaker referred with great kindness to both the living and the dead, where we felt the blows which he delighted to deal upon a prosecution, he was associated with some eminent advocates, and also with some unknown to professional fame

or experience. In his matchless address to the jury he repeated, with careful credit, some of the arguments which these humbler allies had used, and paid them a tribute of praise not less just in conception than delicate in expression. Of the four leading counsel there arrayed—Lord, Evarts, Brady, Larocque—three have gone to their long home.

In the prominent cases of *Horn* and of *Haynes*, arising under the laws for the suppression of the slave trade; and in the great fraud case of *Kobustamm*, it will not be easy to forget either the ability of his defenses, or his subsequent assurance of sympathy in the anxious labors which those prosecutions involved.

He never entered a court-room but smiles from the Bench and Bar responded to his presence. He never appeared upon a platform but to be greeted by thronging auditors. No banquet saw diminished guests while he remained to speak.

"From the charmed council to the festive board,
Of human feelings the unbounded lord."

A lawyer, an orator, a scholar, a gentleman, all that these made him was given to his country in her day of danger, and to the land of his ancestors in every hopeful struggle.

Great in intellect, great in heart—

"See what a grace was seated on this brow,
Hyperion's curls; the front of Jove himself."

Our hearts may well be touched as they rarely have been. Words, unless of fire, tears, unless of blood, should only mock their grief.

"Ye orators, whom yet our councils yield,
Mourn for the veteran hero of your field!
Ye men of wit and social eloquence,
He was your brother—bear his ashes hence!
While powers of mind almost of boundless range,
Complete in kind, as various in their change,
While eloquence, wit, poesy and mirth,
That humbler harmonist of care on earth,
Survive within our souls—while lives our sense
Of pride in merit's proud preëminence,
Long shall we seek his likeness—long in vain."

When "a mighty spirit is eclipsed"—when death comes to the noble and the brave, we cannot but be glad it is the common lot. We would

not shrink forever from the dark path which they are forced to tread. We would not fail to seek them at last in the better world beyond.

Gentle, genial, generous spirit! Our hearts shall long resound with the sweet music of the solemn cathedral, which breathed a prayer for thy peace and rest.

“——— stay not thy career;
I know we follow to eternity!”

HON. JOHN K. PORTER said: If an artist could produce a perfect likeness of JAMES F. BRADY, as we have seen him, under the inspiration of a great theme, and in the glow of earlier manhood, we should scarcely need any thing more to convey to after-times the living impress of the man. In that intellectual and beaming face, lighted up, as it often was, with almost womanly grace and beauty, shone out the character and the genius which made him the most popular advocate of his time. But, even if this were possible, we would not willingly part with him at the portals of the grave without uniting in an expression, with one accord, of our affection and admiration for the man, and of the pride with which we cherish his name.

When the sad tidings of his death reached us, on Monday morning, each of us felt a sudden sense of solitude, as if a light had gone out in our dwelling; and we can heartily sympathise with the feeling which, on the day of the funeral, held the multitude around the thronged cathedral, waiting through the burial service to catch the last notes of the dying requiem. Those who witnessed that scene needed no other assurance that there were mourners at many firesides which had been cheered by our brother's benefactions, and that thousands of hearts beat in unison with ours.

There was perhaps no man in the city of New York who united so many elements of popular strength, or who could have wielded them to better purpose, if he had chosen to make them subservient to the ends of personal ambition. His frank and open nature, his striking and manly presence, and his captivating and fervid eloquence, made him one of the acknowledged masters of assemblies; but his spirit of personal independence, and his taste for more congenial pursuits, disinclined him to the position of a leader, except in his own profession.

So, too, in the department of letters, with his liberal and varied culture and his brilliant powers as a writer, he would have found it easy to attain another order of distinction, which to many is full of attraction;

but his nature was too genial and social to submit to scholastic seclusion, and he chose rather to commune with men eye to eye, in the scenes of more active life.

No one could be more indifferent to the prizes of political life. He declined, without a moment's hesitation, the high office of Attorney-General of the United States—a position which no man in the country would have filled more gracefully.

The common desire for wealth was one which he did not share. In the enjoyment of a princely professional income, he gave away, with an open hand, that which he might easily have so invested as to roll up the fortune of a millionaire; but we cannot doubt that he chose wisely, in view of the universal manifestations of grief at his death, and of the prayers and benedictions which followed him to the tomb.

It was in his personal and professional characters, that he gained the marked preëminence which makes his life a record of honor. Others have spoken of the social traits and personal virtues which rendered his character so attractive in all his private relations; and of those who had the happiness to be numbered among his friends, there is probably not one who does not feel that with the death of our brother, a part of the sunshine of his own life is gone.

The same characteristics which gave him such a hold upon us in our social and personal relations, were among the elements of power which contributed to his eminent success as an advocate. His chivalric and manly bearing disarmed hostility and envy. His frank and generous nature attracted the sympathy of the jury. His personal rectitude and honor commanded the confidence of the Bench. So, too, his intrepidity of spirit, his loyalty to truth, and fervor of conviction, imparted to his eloquence a peculiar power, which was oftentimes resistless.

He had other advantages which are rarely combined, even with those who have risen to eminence at the Bar. He not only had a thorough mastery of the principles of the law, but also a wide and varied culture in almost every department of liberal science, which gave him boundless fertility of illustration, in argument. His perception, too, was so rapid, his mind so clear, and his memory so retentive, that facts, as they were presented in the course of trial, ranged themselves in appropriate order by processes of analysis and induction which were almost simultaneous. Indeed, in dealing with disjointed facts, he exhibited, at times, a power so rare as to seem creative. Give him the bones, and he would not only

shape them into the skeleton, but he would clothe them anew with breathing life.

His faculties were in just equipoise. He rarely had occasion to retrace his steps. He had that unfailing common sense which Shiel happily defined as "the logic of common life." His elements of strength were so admirably compacted, that the ease with which he achieved results often diverted attention from the means by which they were wrought out. Perhaps the most marked characteristic of his arguments was the easy blending of strength with grace, which enabled him so imperceptibly to produce the impression he desired, that it seemed to the listener the thought of his own mind, rather than the conclusion to which he was led by the reasoning of the advocate. His mode of discussion was suggestive, and the auditor insensibly became his ally, by following out the line of argument, from the point at which the speaker designedly paused, to indulge in some passing episode. His manner was so easy and graceful that before his adversary appreciated the tendency of the speech, a lodgment was often made in the mind of the jury which no answering argument could remove. He was an archer whose shaft went always straight and true to the mark. He often carried a cause by a passing felicity of thought and expression, appreciated only in its practical effect, like the stroke of Saladin's blade as it divided the cushion of down.

Whatever he touched he invested with light and beauty. From the moment he appeared in a cause, it assumed a new and dramatic interest. It was sure to be enlivened by wit and eloquence, and the monotony of forensic discussion was often relieved by passages of exquisite pathos and beauty. His rhetoric was unstudied, and all the more effective, as it was the mere incident, and never the aim, of the speech. What he would say, on any given occasion, none of his auditors could foresee; but all were assured, before he opened his lips, that new light would beam on the subject upon which he rose to speak. Eloquent as he was, his greatest triumphs were those which he won by sheer intellectual force. In reading the reports of his forensic speeches, it is interesting to observe their completeness as close and vigorous arguments; while, at the time of their delivery, the attention of all but the court and jury were mainly attracted by the grace of his style and the charm of his elocution. In this respect, many of his noblest productions were not unlike the Corinthian pillar, in which the strength of the column is lost sight of in the symmetry of its proportions and the beauty of its decoration. He never exhausted his resources in a single effort. Great as the speech might be,

we felt that the speaker was greater, and that he needed only an occasion to rise to new heights of eloquence and power. If his had been the exceptional case of genius wholly free from infirmity, we could hardly have entertained for him a more admiring affection; for his was one of those noble natures which, like the mariner's needle, if it sometimes seemed to vibrate, always trembled back to the pole. We mourn his early death, as the extinguishment of one of the brilliant lights of the American Bar. We mourn it as the loss of a brother and a friend, who has left an impression upon us all which time can never efface. Those of our number who are still young will cherish his memory when they come to be old, with the freshness and warmth of youthful love and remembrance.

HON. CHARLES P. DALY said: *Mr. Chairman*—I have been asked by the committee to say something upon this occasion. I feel that they have a right to expect it, as I have known our lost friend and brother longer and more intimately than any one in this meeting; and yet it is that very circumstance which makes it more painful and difficult for me to discharge such a duty, than it would be for any other gentleman present.

He was the earliest friend of my youth. A large portion of his life was my life. I have known him from the time that we sat together—he at the age of seven, and I at the age of six, on the same bench in his father's school-room—forty-six years ago. It is very difficult, therefore, for me, Mr. Chairman, to discharge this duty, bound up as it is with so many memories, extending over such a range of years, and interwoven with so many incidents of a friendship, beginning so early, and ending only with death.

I will, as well as I can, say in a few words what it may be appropriate that I should say respecting him after what has been already said.

His father, a man of considerable acquirements as a scholar, kept a school in Warren street, in this city, where he taught a limited number of pupils, but two or three only of whom survive, one of them being the present Archbishop of New York. In that school I remember him—a little boy with a large head and a very small frame. I think I see him now, with his great head bending over his desk, and his little feet playing beneath it; his mind intensely fixed upon his lesson, which he was rather slow to acquire; for, as has been the case with many remarkable

men, in early youth he gave little or no indication of the brilliant qualities by which he was afterwards distinguished.

I give this as the impression of his schoolmates; it was not that of his father, who always regarded him—though a shy and retiring lad—as a self-reliant and remarkable boy, who would one day make a figure in the world. I remember him, and such of his schoolmates as survive will remember him, as a great warm-hearted little boy; exceedingly unselfish, most affectionate in his attachments to his young school companions, and exceedingly beloved by them; qualities which in his subsequent career, amid the distinction that attended it, were never abated nor extinguished, as every one knows that knew him, or was ever brought into personal contact with him. As an evidence of this I may mention a touching incident: An humble Irish serving-woman, employed in a house where he had been staying temporarily, bought, after hearing of his death, out of her small earnings, a camellia, and bringing it to the door of his late residence in Twenty-third street, requested that it might be laid upon his coffin. This beautiful feature in his character, which distinguished him even more than his intellectual qualities, was one constantly apparent in the relations of private friendship; and it is therefore exceedingly difficult for me to dwell upon it.

Of his many professional accomplishments I will refer to one, inasmuch as it was the one by which he was so eminently distinguished. It is said that great orators are made by study, care and practice. In his case it was otherwise. He had no early forensic training. I heard his first public, political speech, and I was present at the first trial of any importance in which he summed up to a jury—the latter (I think an insurance case)—was one in which Mr. O'Connor was opposed to him. On both of these occasions he was as perfect, and elicited as much admiration and applause, on the part of those who heard him, as he ever did in the later efforts of his maturer years. There was the same unhesitating command of language; there was, as Judge Porter has called it, the same "boundless felicity of illustration," the humor, the delicate irony, the occasional pathos, and the earnestness which made him so magnetic in the influence which he exercised over a public assembly, and in summing up a case to a jury. His style was his own. It was formed upon no model, and was incapable of imitation, for it grew out of, and was a part of, the man.

I will say a word in respect to his professional habits for the benefit of the younger and striving members of the Bar. He was a man of large

engagements, professional and public. Greater claims were upon his time in matters outside of his profession—political, literary and otherwise—than in the case of any other man whom I have known, and he was as extensively retained in important cases as any other gentleman of the Bar; and yet, whether it was to argue a question of law before the highest court of the State, or to try a cause before a jury, or to deliver a lecture on some literary topic in a neighboring city, or to go here, or to some other part of the country, and address a public meeting upon a matter of absorbing public interest, he was, when the time came, generally prepared, and always felicitous and full of point and effect. This was owing in part to his great natural abilities, but it was owing much more to what was not commonly supposed to be the fact, to his industry. There is not a man in this city who could, without previous notice, speak more readily or effectively, as I have known to have been the case in many instances, when it was impossible for him to have been prepared; and yet he never omitted the opportunity, if he had it, of thinking over what he would or ought to say, and of maturing in his mind the principal points or arguments. I doubt if he ever wrote out a speech in his life; but if he could, he arranged in their order the leading features of it, and left the rest, together with the language, to the occasion; and when the occasion came, under the excitement and inspiration of speaking, a great deal occurred to his quick, fertile, and suggestive mind; and some of his most felicitous illustrations, his brightest flashes of wit, and most telling allusions, were born as they were uttered. It was this which gave to the whole speech that easy air of unpremeditated art, and made everything which came from him so fresh, captivating, and attractive.

I may also mention, as the result of my own observation and experience, that, although his abilities as a forensic orator were very remarkable, and his power over a jury equal to that of any man I have ever known, his greatest merit, in my opinion, as a lawyer, was his skill in the management of a cause. He exhibited an instinctive judgment, a quickness of apprehension, and a knowledge of human nature, in developing or bringing out the details of a case, that has rarely been surpassed in my experience, and this, I think, my brethren on the Bench will agree, is the method by which success in legal controversies is secured.

I would say something further, Mr. Chairman, if I dared to trust myself, and could master my own feelings, in reference to his youth, to his childhood, to his lovely incipient manhood, and the noble qualities by which he was distinguished, and which he owed in a large degree, as

many men have, to the early influence of a remarkable mother. He had a father who was, as I have said, an accomplished scholar, and to whose teaching he was indebted for many of his acquisitions, especially in the languages. But he had a mother who exercised a deeper influence upon his character. A woman, noble and handsome in person, as I remember her, having a fine natural intellect—one of those mothers clothed with those nameless maternal graces, and possessing those quiet virtues, which shed their blessed influence over families, and are felt so long, in their durable effect upon the future character of their children. Of her, he and his brothers and sisters were deprived at an early age; but her influence remained. He never, during life, loved a human being as he loved her. Her name was never mentioned in his presence without giving rise to some expression, the depth and tenderness of which showed how her memory was embalmed, and rarely before me without the tears coming to his eyes. Perhaps, as has often been suggested with respect to other able men, he derived through his mother many of the fine intellectual gifts of which gentlemen have spoken; and certainly there is no source to which, in the manliness of our nature, we would more willingly attribute our gifts, than to that parent who is, particularly among intellectual men, especially cherished and venerated.

I do not mean to say, Mr. Chairman, that, possessed as he was of so many fine qualities and virtues, he was without his faults. There is rarely, if ever, such a thing as perfection in human character, however we may pretend hypocritically by outward appearances to assume it; and he was no exception; nor did he pretend to be. I leave him here; and will, in the closing words of a poem which was a great favorite of his during life,

"No further seek his merits to disclose;
Nor draw his frailties from their dread abode,
Where they alike in trembling hope repose—
The bosom of his Father and his God."

Mr. CHARLES O'CONOR said: *Mr. Chairman and Gentlemen of the Bar*—My generation, now drawing toward its close, has already spoken through my peer in point of age and experience, and my superior in knowledge of mankind, and in that eloquence which has sought this fit occasion for its rich display.* Youth has laid upon the tomb of our departed brother its bright and fragrant wreath. Middle age, his equal

* Mr. Cutting.

and his peer in experience, in advocacy, and in counsel, has paid its copious tribute. We have heard the best, the ablest, and the most respected of his cotemporaries, descant in modest and becoming language upon the merits of JAMES T. BRADY. Venturing any addition to this absolutely perfect record of affection, of respect, of homage, may seem presumptuous. Indeed, I fear nothing may be added worthy of your attention. It would be otherwise if I possessed his readiness and versatility, or if, as should have been the case, he stood at this hour by my tomb. Were such the case he would speak as I could now wish to speak of him. Though conscious of these reasons, commending silence to me, there are some circumstances which might, in the estimation of many, render it unbecoming; and, therefore, however feeble the effort, or unequal to the occasion, I must present a few remarks. As one in active life, not unobservant of the things and of the men around him, not without power of reflection, or unused to employ it in contemplating the characters of my juniors, I well knew JAMES T. BRADY. I was admitted to the Bar previously to the admission of his father, and to some extent performed the office of assistant counsel to that father. I often conferred with him near the desk at which sat his son JAMES—ever commended by him as the hope of the family. The modesty and silence of the youthful student seemed to require some such patronage. For, so marked were they, that notwithstanding the graces of his figure, which were great even then, and the gravity, sobriety and good sense which beamed forth from his intelligent countenance, his demeanor might well lead a hurried observer, such as I was, to pronounce him not promising. Of course I observed his subsequent career. Being many years his senior, my occasions of professional intercourse with him, either as an associate or as an opponent, were few—in the latter capacity they were extremely few. As an associate, though not frequent, they were somewhat remarkable. On some of them Mr. BRADY gave proofs of ability as a lawyer which tended effectually to fix in the public mind his professional position. Shall I speak of those qualities for which at the Bar he was distinguished? Why need I? They excited universal attention and interest, and they have been fully placed before you in the observations of his cotemporaries. They have been portrayed in language most truthful and beautifully expressive by those of his own age, and by one very brilliant junior.* The method in which this duty has been performed may tend somewhat to diminish our deep and general grief for his loss. We find

* Mr. E. DeLafield Smith.

that although BRADY has passed away, the fruits of his example remain. The genius, the abilities, the fine qualities of heart and the attractive manner that won for him the admiration of all who knew him, also won for him a host of imitators. In pursuing the course indicated by his example, they will pay him even a higher compliment than is expressed in any words they have uttered here to-day. In so doing they will, in a measure, supply his place. To say that Mr. BRADY was a brilliant orator, would be saying little; for in this he was not unsurpassed in the times that have gone before us; and what we have heard to-day gives promise that he will yet be equalled in the time to come. To say that he was a laborious and faithful counselor, or that he was an able, studious, richly-gifted jurist, would be saying only that which may be truly said of many at our Bar who lived in his day, and have survived him. But there are some things in which Mr. BRADY was marked and peculiarly eminent. Perhaps it is because his special gifts have been so long familiar to us that it has not seemed needful to make any utterance concerning them. It is in reference to these hitherto scarcely noticed features of his character that I purpose to say a few words.

I heard from at least one of the speakers a compliment bestowed upon Mr. BRADY's integrity. I do not know that I have heard from one of them, or more than one at most, any observation referring to his remarkable self-reliance, and determination. To these traits I will confine my remarks. As to self-reliance I can say that as far as my observation and experience enable me to judge, no man ever exhibited the quality in a higher degree than Mr. BRADY. Our city became vastly extended in his day. When he began life it was comparatively small, and many things then existed affecting the daily life of the citizen which can hardly be perceived in the great metropolis of to-day. Mr. BRADY began life as a presumed representative of a national class, not highly fashionable, nor, in the main, composed of persons in a condition favorable to their bestowal of immediate gratifications upon youthful ambition. He also belonged to an ancient and very unfashionable faith, and his political opinions made him a member of the extremest wing in certainly the least fashionable of the political parties. Mr. BRADY was without fortune, without powerful friends and without any means wherewith to achieve eminence amongst men, but the power of his own brain, his native eloquence, and, I may say, the strength of his own hand. Under such circumstances an ordinary young man full of ambition, like Mr. BRADY, would only have conformed to the dictates of self-interest in shunning all

reference to *these* subjects. Yet no man ever saw him lean toward such a weakness. Down to the last, he was proud of the country from which his parents came, almost forgetting, in the frequency of his references to it, the glorious land of his birth. Be that, however, no discredit; for the land of his fathers demanded his sympathy, whilst the land of his birth was flourishing in illimitable prosperity, and needed no aid from any quarter. During the early part of his life, and indeed continuously to the end, when to be sure it was less a merit, he ever seemed proud of the insignia which in respect to origin, faith and political sentiment, tended to make him a pariah in the eyes of wealth, fashion and social power. He could not consent to be loved and cherished as other than just what he was. He stood by that which JAMES T. BRADY believed in and revered, be the consequences what they might.

Now in all this there might seem but little merit had he been a seeker after political popularity and political eminence. There, like some others, he might have found compensation. But where reward was to be found, he was neither a courtier nor a seeker.

His integrity has been spoken of. If he had been here and had heard it, the compliment would have given him offense. Such were the lofty views entertained by that truly noble mind, such his perfect truthfulness, his pure integrity, his steadfast adherence to that which he deemed right, that he would have scorned a compliment on the score of mere integrity. Perhaps I know this better than some who hear me. In the whole course of Mr. BRADY's life, he never suffered the slightest even momentary impeachment, save once. His course on that occasion was characteristic. He scorned all explanation and simply set censure at defiance. But the hour of clearing up arrived, when he who had been foremost in the charge, vanquished by the manifest inadequacy of his own proofs, pronounced Mr. BRADY not only innocent but free from any shade of suspicion. This was done openly in a public court: it gave to Mr. BRADY's client the trident of victory by the absolute concession of his opponent. Almost any other man would have made the welkin ring with his triumphant exculpation. Quite different was the action of Mr. BRADY. He had from the first hurled defiance at the impeachment: he now treated the retraction with a proudly scornful disregard. The vindication of his rectitude was never permitted to find a place even in the daily papers; and it remains unrecorded. You know only the general facts, I shall not descend to details.

In the respects which I have referred to, Mr. BRADY was an example worthy of imitation.

It was my fortune to agree with Mr. BRADY in all the opinions to which I have thus far adverted—not indeed from any special communion between us, but it so happened. We thought alike. I shall not say whether or not we agreed in reference to the subjects which I shall hereafter mention.

His exemplary, nay, brilliant line of action, upon the trial of the crew captured on board the privateer *Savannah*, has been a subject of commendation. I will speak of it in connection with my theme, the inflexible firmness of his character as evinced in the fearlessness with which he formed opinions, and the steadiness with which he adhered to them. Conscious of perfect rectitude in all his purposes, no amount of opposition could induce him to swerve from them.

When that disastrous event took place which divided this great Republic, and from a band of united brothers converted our people into two great warring nations, JAMES T. BRADY—I speak not to commend, but to narrate—JAMES T. BRADY, obeying what might well have been expected from his highly emotional nature, sprang to the banner of his own section, and arrayed himself among his life-long associates. He declined to discuss points of constitutional law, or to weigh questions of mere legal right and wrong, but he insisted upon calling forth the power of the land, to uphold what in his judgment seemed the interest and honor of his country. In this he persevered throughout the struggle. As far as I am aware, his opinions and feelings remained unaltered to the end. And yet, perhaps, the two most remarkable circumstances connected with his professional career during this period were such as to excite among superficial observers a doubt of his earnestness. When the crew of the confederate privateer *Savannah* were placed upon trial in the city of New York, for piracy, JAMES T. BRADY, unrewarded, so far as I know, appeared as the leading champion of the defense, demanding an acquittal. When the struggle had passed—when the mighty conflict was over, a somewhat similar drama was announced. The chief of that great confederacy was summoned to a similar ordeal; and, at once, under the influence of similar sentiments, JAMES T. BRADY appeared as his defender. For this unpopular and arduous office he also declined compensation, though ample compensation was tendered. In these acts you see evinced the self-relying determination of the man's character—his firm and discriminating judgment. His feelings, his prepossessions, his interests, all

that could engage the heart of man, placed him upon the side of the North. Could he have so directed the enginery of war, its stroke would have been fatal to every armed foe found throughout the South. But he had a cool, dispassionate judgment, knowledge of the law and a sense of decorum; and these led him to certain definite conclusions. Here, too, I speak not to commend, but to narrate; for on these subjects there are varieties of opinion. He thought that courts, juries, and the gallows were unfit weapons of war; he deemed them most unfitting accompaniments of the peace which arms had won. His moral convictions forbade their employment against those who had chivalrously contended with us in the field; and therefore acting in what, to the unthinking, might seem to be an inconsistent manner, he boldly confronted the common sentiment, holding its disapproval as naught when in conflict with his own judgment.

Such was Mr. BRADY. It may not have been his most amiable trait, or that which commanded for him the highest measure of personal attachment; but in my estimation his greatest quality was this sternly inflexible adherence to his convictions. It gave the greatest efficiency to his fine powers; it enabled him always to strike justly for the right, and to speak in mercy for those who should be spared. I am free to say it was this which most attracted to him my admiration and respect.

Whether the created divinities who preside over this world's fame will accord to his memory a niche in their already overcrowded Pantheon, I may not say; but, certainly, his associates, one and all now mourning his premature departure, will hold him in precious remembrance whilst they live. Whatever of frailty marked his career, served but to show that he partook of our common humanity, and to invoke a rich blessing on his dying hour. The only flower of earth that is immortal then shed its fragrance around him. Penitence, that opens to its possessor the portals of eternal bliss, gave to his immediate family and kindred manifest promise of that happy reunion which is their consolation, and should be our highest hope.

The question was taken on the resolutions, and they were agreed to.

Mr. A. J. VANDERPOEL said: I have been requested to offer, in addition to the resolutions which have been adopted by the meeting, the following:

Resolved, That the members of the Bar, as a further testimony of regard and respect for our departed friend and professional brother, wear a badge of mourning for thirty days.

Resolved, That the proceedings of this meeting, subscribed by its officers, be transmitted to the relatives of the deceased.

Resolved, That a committee of three be appointed by the chairman, to prepare, and cause to be printed in a suitable form, the proceedings of this meeting, that they may be preserved in *memoriam*.

The resolutions were adopted; and the President appointed Aaron J. Vanderpoel, Clarence A. Seward, and John E. Burrill, to act as the committee.

The meeting then adjourned.

PROCEEDINGS OF THE NEW YORK LAW INSTITUTE.

At a stated meeting of the *Law Institute*, held in their Library Room, on the 8th of March, 1869, CHARLES TRACY, Esq., second Vice-President, in the chair, and CLARENCE A. SEWARD, Secretary *pro tem*.

HON. JOHN W. EDMONDS offered the following preamble and resolution:

The Law Institute of New York would be unfaithful to its own emotions if it omitted to add its sigh of regret to the current of sorrow which has so lately flowed, in our midst, at the lamented death of its late President, JAMES T. BRADY.

It was within these walls, consecrated to the learning and wisdom of centuries, of our profession, that its members so often witnessed his presence with pleasure;

It was here that his generous and genial nature was wont to pour itself out, to the delight of the young and the old, the gay and the grave;

It was here that we were accustomed to see him, preparatory to some forensic effort, skimming as it were in bird-like flight over our thousands of volumes, and seizing by instinct the eternal principles of law and justice treasured there;

It was here that, after some startling outbreak of his genius, in the courts, he would meet us, in the most sincere unconsciousness on his part that the effort which had held his auditory in breathless attention was any thing more than every one could do just as well;

It was here that to his younger and less gifted brethren of the profession he was ever ready with his advice, his assistance, and his cheering words of encouragement;

And here ought to originate some more enduring monument, that shall not only help to perpetuate his memory amid the busy and engrossing life of the profession, but preserve for future guidance the example of his integrity, his genius, his courtesy and his generosity.

Resolved, Therefore, that a committee be appointed, charged with the duty, in behalf of the Institute, of preparing such a memorial of him as shall best comport with our regard for him, and his claims to our lasting love and admiration.

Mr. VANDERPOEL moved the following, as an amendment and addition, which, being seconded by Mr. Terry, was adopted :

Resolved, That the committee be instructed, under the foregoing resolution, to procure a marble bust of Mr. BRADY, to be placed in the Institute.

The resolutions, as amended, were then unanimously adopted, and John W. Edmonds, Edmund Terry, Edward Patterson and Clarence A. Seward were appointed the committee.

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A

ACKNOWLEDGMENT.

See DEED.

ACTION.

1. Actions for injuries to the person are transitory, and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner, in our courts, for a tort committed in another country, the same as on a contract made in another country. *Dewitt v. Buchanan*, 81
2. Where one has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value. *Hawk v. Thorn*, 164
3. Such a cause of action is assignable. *ib*
4. A complaint alleged the sale and delivery to the defendants, by the plaintiffs, of a couple of hogs, at a specified price, which remained unpaid; and, for a separate and distinct cause of action, stated that the defendants received and took without rightful authority, one calf, which had been consigned to the plaintiffs by a third person, who was the owner thereof; that they sold the same without authority, and received therefor a sum named, which was the value of the calf; and that the claim and demand for the value of said calf had been assigned to the plaintiffs by the owner. *Held*, on demurrer, that both causes of action were founded on contract; the one express, and the other implied by law; and were properly joined. *ib*
5. In order to avoid multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But when several claims, payable at different times, arise out of the same contract or transaction, separate actions can be brought as each liability enures. *The Reformed Protestant Dutch Church of Westfield v. Brown*, 191
6. Yet, if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in that suit will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought. *ib*
7. The grantor in a trust deed, as the legal owner of the property conveyed, has no right to maintain an action to obtain a construction of the deed. That privilege is confined to the trustee, or those claiming under the trust and requiring its execution. *Levy v. Hart*, 249
8. Although the forms of action were abolished by the Code, the principles by which the different forms of action were previously governed still remain, and now, as much as formerly, control in determining the rights of parties. *Elbridge v. Adams*, 417

9. In pleading, a party is now to state the facts on which he relies to sustain a recovery; and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action. *ib*

See CORPORATIONS, 2, 3.
JOINT STOCK ASSOCIATIONS, 7.
JURISDICTION, 1, 4.
TELEGRAPH COMPANIES, 3.

ADVERSE POSSESSION.

1. Possession by a tenant, of a portion of a lot of land, under a lease, and the clearing up and cultivating a part thereof, such possession being under a claim of title by the lessor, which is evidenced by his executing the lease and demanding and receiving rent, is a good adverse possession, at least to the extent of the land cleared and cultivated. *Finley v. Cook*, 9

2. A comptroller's deed, given upon a sale of land for taxes, with actual possession of a part of the lot embraced in it, and claim of title to the whole, is a sufficient foundation for an adverse possession, even though the comptroller had not authority to sell. *ib*

3. If such deed be fair upon its face, and contains no evidence of want of authority by the comptroller to execute it, inasmuch as it purports to be executed under an authority, it gives color of title to the grantee, although the pretended authority recited upon its face does not in fact exist. *ib*

4. The possession and claim of title of the grantee in such a deed, and of those claiming under him, will be presumed to have been in accordance with the title apparently derived from the comptroller's deed; and as that deed did not show that it was illegal or void, the possession and claim under it will be presumed to have been in good faith, and therefore adverse to the title of the former owner, and if continued for the period of twenty years, will ripen into a perfect title. *ib*

5. Actual possession of a part of a lot of land, with claim of title to the whole, the entry and claim being under a written instrument, is sufficient to constitute an adverse holding of the whole lot. *ib*

ADVICE OF COUNSEL.

See CONTEMPT, 2, 3.

AFFIDAVIT.

See HIGHWAYS, 6.
PRACTICE, 7.

AGREEMENT.

1. A person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one, for the benefit of the other. *Greenwood v. Spring*, 375

2. A contract made by an individual as the agent of both parties, is not void, but only voidable, at the election of the principal, if he come into court within a reasonable time. *ib*

3. It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. It is at his option to repudiate, or affirm, the contract, irrespective of any proof of actual fraud. *ib*

4. But unless application be made, within a reasonable time, to set it aside, a valid title will pass, if it be upheld by a sufficient consideration and the proper forms have been observed. *ib*

5. If application to set aside such a contract be not made within a reasonable time, the delay will be considered a waiver. *ib*

6. It is well settled that a new promise to pay is no defense to an action brought upon the original obligation, although expressly agreed to be taken as payment; the reason being that there is no consideration for the agreement to receive the new promise in payment. *Rice v. Denny*, 456

7. When this reason does not apply, the rule no longer prevails. If any new or additional security, or other benefit, is obtained by the creditor, or any detriment sustained by the debtor, by the new arrangement, the defense is perfect. *ib*
8. Thus where promissory notes bearing interest are given and received in payment of interest due upon a mortgage, a demand not drawing interest being thus converted into a debt on interest, this is a good consideration for the agreement of the holder of the mortgage to accept the notes in payment. *ib*
9. If the vendee, subsequently to the execution of a written contract, which is declared void by the statutes of Pennsylvania, for being made on Sunday, demand, on a week day, a conveyance of the property and receives the same, promising to pay the purchase price, a new and valid contract arises between the parties, which entitles the vendor to an action to enforce payment. *Hamilton v. Gridley, 542*
5. Although section 172 of the Code gives to a defendant the right to serve an amended answer as of course, within the time therein prescribed, yet this right may be waived. *Phillips v. Suydam, 158*
6. When a party notices a cause for trial upon the pleadings as they stand, he will be considered as waiving the right to amend his pleading as of course, and will be regarded as having elected to stand by the issue as then framed. *CLERKE, P. J., dissented. ib*
7. An application for leave to amend a pleading, on the trial, is always addressed to the discretion of the court; and if denied, is not the subject of appeal or review. *Dennis v. Snell, 411*

ANSWER.

By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless in terms it adopts or refers to the matter contained in some other answer, it must be tested as a pleading, alone by the matter itself contains. *Baldwin v. The United States Telegraph Company, 505*

APPEAL.

- ## AMENDMENT.
1. To allow a plaintiff, after judgment, to come in, not as a right, but as a favor, and plead the statute of limitations in bar of a counter-claim set up by the defendant in his answer, would not be "in furtherance of justice." *Clinton v. Eddy, 54*
 2. By suffering the action to go on, without setting up the statute, in a reply, the plaintiff will be deemed to have elected to stand upon the other defenses made by him to the counter-claim, on the trial, and should not be allowed to abjure such election. *ib*
 3. Under such circumstances, the only proper mode of attacking the judgment is by appeal. *ib*
 4. Such an amendment does not come within the terms of either section 173 or section 174 of the Code; and to allow it to be made, after judgment, would be a stretch of the power of amendment. *ib*
1. It is doubtful whether an appeal to the Supreme Court can be taken from an order of a county court denying a new trial, until after judgment, and then only in connection with an appeal from the judgment. *Per JAMES, J. Taylor v. Scoville, 84*
 2. Although, under section 122 of the Code of Procedure, the court may determine any controversy between the parties before it, yet where neither of the defendants, in his answer, demands of the court any relief, as against the others, but each merely asks that the complaint be dismissed as to him, it is too late to demand any more, on appeal. *Garvey v. Jarvis, 179*
 3. An order made by the court, in proceedings supplementary to ex-

cution, directing a defendant to be punished for a contempt in not answering questions propounded to him concerning his property and business, is an appealable order, under the Code, (§§ 248, 349,) as affecting a substantial right. *Forbes v. Willard*, 520

See AMENDMENT, 3, 7.
BANKS AND BANKING, 1, 2.
HIGHWAYS, 9, 10.

ARBITRATION AND AWARD.

See LEASE.

ARREST.

1. So far as the facts upon which an order of arrest, in an action of tort, is based are concerned, the court will, in ordinary cases, allow the order to stand, and abide the trial of the issues. The truth or falsity of such facts should never be decided on a motion. *Nelson v. Blanchfield*, 630
2. But where, after the perpetration by the defendant of certain alleged frauds, in the purchase of stock for the plaintiff and refusing to transfer the same to him or to refund the money advanced for such purchase, there was a settlement between the parties, and the plaintiff accepted the defendant's note for \$700, 100 shares of a specified stock, and a due-bill for 200 shares of the same stock, giving a receipt stating that it was a "receipt and settlement for all claims" which he held against the defendant; *Held* that this was a condonation of the tort, and a waiver of the plaintiff's right to arrest the defendant; and that it was a proper case for vacating the order of arrest, on motion. 5b

See PARTNERSHIP, 1, 2, 4, 5.

ASSESSMENTS.

See NEW YORK, (CITY OF,) 2 to 7.

ASSIGNMENT.

See ACTION, 3.

ATTACHMENT.

1. The notice, accompanying an attachment, to be served by the sheriff on a third person who is in possession of property claimed to belong to the debtor, may describe the property in general terms, without specifying its precise nature and amount. *Drake v. Goodridge*, 78
2. This point, which was so decided at special term, in *Greenleaf v. Mumford*, (19 Abb. 469,) was not considered by the general term, in that case, on appeal, nor was the ruling of the special term in respect to it overruled. 5b
3. Where the defendant, when called upon, on several occasions, to pay the plaintiffs' debt, put them off, stating that her husband, every night, took all the money which she had received during the day and paid it to persons from whom she had bought goods; which payment was disproved, by affidavit; *Held* that the act of the defendant, in allowing her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, was to be deemed done with intent to defraud her creditors; that she was therefore amenable to the charge of having "disposed of" her "property with intent to defraud" them; and that, consequently, the plaintiffs were entitled to a warrant of attachment, under the provisions of section 229 of the Code. *Anderson v. O'Reilly*, 620

ATTORNEY.

1. When an attorney is employed by a party, the law implies a contract between them; and before a new partner of the attorney can be made a party to such contract, there must be some agreement or understanding to place him in a position which will enable him to make a claim against the client, for services in the suit. *Davis v. Peck*, 425
2. In the absence of any proof of such an agreement, or the substitution of the firm as the attorneys or counsel of the party, the relation of attorney and client does not exist be-

tween the firm and such party, with the assent of the latter; and consequently the attorney originally employed may recover for his services in the suit, in an action brought by him alone. *ib*

B

BANKS AND BANKING.

1. An appeal from a judgment, in the name of a State bank subsequently merged in a National bank, is the *defense of a suit*, within the meaning of the second section of the act of the legislature, of March 9, 1866, (*Laws of 1866, p. 169*), which provides that any State bank, by its organization under the laws of the United States, shall be deemed to have surrendered its State charter, but that "every such bank shall nevertheless be continued a body corporate for the term of three years * * for the purpose of *prosecuting and defending suits* by and against it, and of enabling it to close its concerns," &c. And if such appeal is taken within the three years from the time of its conversion into a National bank, the State bank must be deemed to continue in existence *as to such appeal or defense of the suit*, until the appeal is heard and determined. *Clayton v. The Farmers and Citizens' Bank of Long Island*, 228
2. In case of the failure of the National bank, and the appointment of a receiver, such receiver may take, and has a right to prosecute, such appeal, under section 121 of the Code. *ib*
3. Where one banker receives from another a promissory note, made by third persons, for collection merely, with instructions to remit the proceeds, when paid, in a draft, which note is subsequently paid by the makers, the receiver giving credit therefor to the person from whom he receives it, without any knowledge or notice that any other person than the one transmitting it to him has any interest therein, he has a right to retain the proceeds as against the true owner, on account

of a balance due to him from the transmitter. *Dickerson v. Wasson*, 280

BILL OF SALE.

See VENDOR AND PURCHASER, 8.

BOARDS OF EDUCATION.

See CONSTITUTIONAL LAW, 6, 7, 8, 9.

BONA FIDE HOLDER.

See CHECKS.

MORTGAGE, 5.

BONDS.

See MUNICIPAL CORPORATIONS, 3.

C

CANALS.

1. It is the duty of a superintendent of repairs on the Erie canal to remove obstructions which hinder or prevent navigation thereon. *Hicks v. Dorn*, 179
2. And a superintendent having in good faith determined in regard to the necessity and propriety of removing a boat belonging to an individual, as an obstruction in the canal, he can only be held responsible to the owner upon the ground that he was chargeable with negligence, or improper conduct, in executing the work. *ib*
3. If a superintendent of canal repairs can repair a breach in the bank of the canal occasioned by a flood, by a resort to *ordinary* means, and thereby continue navigation without material interruption, or serious detriment to the public welfare, it is his duty to do so, instead of adopting the *extraordinary* measure of cutting a piece off a canal boat owned by an individual, in order to close the gates of a lock. *ib*
4. And where the proof showed that there were several other methods by

which the obstruction caused by a canal boat grounding in the gates of a lock could have been removed, and the difficulty obviated; it was held that the superintendent of repairs was not justified, on the ground of "an overruling necessity," in cutting the boat in two and removing a portion thereof, thereby subjecting the owner to a loss of his property. 53

5. *Held, also*, that in what he did, after he determined the necessity of removing the obstruction, the superintendent must be deemed to have acted ministerially, and was therefore bound to exercise reasonable care, prudence and discretion in performing the work. 53

See RIGHTS OF PROPERTY.

CARRIERS.

See TOW BOATS.

CASES COMMENTED ON AND DISTINGUISHED.

1. The case of *Matties v. Lillis* (24 How. Pr. R. 264) distinguished from the present. *Corning v. Lewis*, 51
2. The point that the notice accompanying an attachment, to be served by the sheriff on a third person who is in possession of property claimed to belong to the debtor, may describe the property in general terms, without specifying its precise nature and amount, which was so decided at special term, in *Greenleaf v. Mumford*, (19 Abb. 469,) was not considered by the general term, in that case, on appeal, nor was the ruling of the special term, in respect to it, overruled. *Drake v. Goodridge*, 78
3. The case of *Beach v. Crain*, (2 N. Y. Rep. 86,) distinguished from the present. *The Reformed Prot. Dutch Church of Westfield v. Brown*, 191
4. The principle of the rule laid down in *The People v. Brown*, (4 Denio, 129,) viz., that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the

keeper of a bawdy house, applies to any person who is personally concerned in the keeping of such a house. *Loonstein v. The People*, 299

5. The case of *Rechnell v. Nearing*, (85 N. Y. Rep. 802,) distinguished from the present. *Campbell v. Evans*, 566

CERTIORARI.

1. On a common law certiorari the Supreme Court is not restricted to the inquiry whether the court below acted within its jurisdiction, but may go further, and examine whether any error in the proceedings has been committed. *The People ex rel. Martino v. The Board of Commissioners of Pilots*, 145
2. The writ of certiorari, in its office of removing final adjudications for review, possesses all the characteristics of a writ of error under our former system of practice, and performs the same office, as to inferior summary tribunals, that a writ of error did to an inferior court of record. *The People ex rel. Mitchell v. Lawrence*, 589
3. The common law certiorari, proper, removes only the record, or entry in the nature of a record, of the proceedings of the court below, whereby only the jurisdiction and the regularity of its proceedings are reviewed. But when the writ is authorized by statute, the authority of the court is not limited to questions of jurisdiction and regularity. It has power also to examine, upon the merits, every decision of the court, or officer, upon questions of law, and to look into the evidence, and affirm, reverse or quash the proceedings, as justice shall require. 53
4. The writ may properly issue to review the action of a jury in the reassessment of damages under the highway act, on appeal from the decision of commissioners appointed by a county judge. 53

CHARITABLE ASYLUMS.

1. By the act incorporating a charitable asylum, the trustees were au-

thorized to make all proper and necessary rules and regulations for the government of the corporation, not inconsistent with the constitution and laws of the United States and of the State of New York. *Held* that by-laws adopted by the trustees forbidding the inmates to leave the premises without permission from the governor of the asylum, or one of his assistants, or indulging in contention, or boisterous and disorderly conversation at table, on pain of expulsion, were reasonable, proper and valid; and that for a breach thereof, by an inmate, the governor was authorized to dismiss the offender from the institution, by the direction of the executive committee. *The People, ex rel. Newman v. The Sailors' Snug Harbor*, 582

2. But that on a charge being preferred against an inmate, of violating the rules, he was entitled to reasonable notice of the examination, and an opportunity of being heard, of exculpating himself and of disproving the charge. *ib*
3. The action and proceedings of the trustees, or the executive committee, in investigating such a charge, *it seems*, are not beyond the control of, or a review by, the Supreme Court. *ib*
4. It *seems* that the governor of such an institution has no power to expel an inmate for a violation of the by-laws, without the authority of the trustees, or at least, of those constituting the executive committee. *ib*

CHECKS.

A check, after having been indorsed by the payee and another person, was presented at the bank, and certified to be "good." Subsequently, the drawer, discovering that he had been defrauded, directed the bank not to pay the check; and when it was presented for payment, the latter wrote across its face, "payment stopped," and returned it to the payee. The latter, after erasing the words "payment stopped," so that they could not be read, and affixing a revenue stamp over the erasure, transferred the check to another

person, through whom the plaintiff received it in deposit for collection, in the ordinary course of business, in good faith, without knowledge or notice of the circumstances, and without sufficient appearing on its face to put the plaintiff on inquiry. *Held* that the plaintiff was to be deemed a *bona fide* holder of the check for value, and entitled to recover the amount thereof from the drawee. *The Nassau Bank v. The Broadway Bank*, 286

CODE.

See **NE EXEAT.**

COMMISSIONERS OF EXCISE.

See **CRIMINAL LAW**, 10 to 21.

COMMISSIONERS OF PILOTS.

1. The board of commissioners of pilots, after having granted new licenses to individuals, authorizing them to act as pilots for one year; cannot revoke such licenses for an alleged violation of rules occurring previous to the date of the new licenses. *The People ex rel. Martino v. The Board of Comm'rs of Pilots*, 145
2. By considering applications for new licenses, and determining to issue such licenses to the applicants, the board will be deemed to have waived and forgiven all previous offenses. *ib*

COMMITMENT.

See **HOUSE OF REFUGE.**

COMPTROLLER'S DEED.

1. Section 55 of the act of the legislature of 1855, (*Laws of 1855, p. 799*.) made comptrollers' deeds for lands sold for taxes, *executed after the passage of that act*, presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regu-

lar. This section was amended in 1860, (*Laws of 1860, ch. 209*), by adding thereto as follows: "But where the person or persons claiming title under such conveyance, or the grantees or assignees of such persons, shall be in possession of the land described therein, either by himself or themselves, or his or their grantees, assignees, agents, tenants or servants, then such conveyances shall be presumptive evidence of the facts above stated, *whatever may be the date of such conveyance*." This amended section should be construed as including not only the case of an actual possession of the whole lot covered by the deed, but the constructive possession of the whole, when there is actual possession of a part of the land covered by the deed, with claim of title to the whole. *Finley v. Cook*, 9

2. Giving the section that construction, the title of a party claiming under a comptroller's deed is perfect, without proof of any other fact than that he was in possession of a part of a lot under the deed, claiming title to the whole. *ib*

See ADVERSE POSSESSION, 2, 3, 4.

CONSIGNOR AND CONSIGNEE.

1. Oats were purchased by W. from various persons, under an agreement between him and the defendants that such oats should be consigned to the latter; they were paid for by drafts drawn upon the defendants; but there was no agreement for a lien by the defendants upon the property to be purchased by W., or that the title should be in them from the time of the purchase. Held that the defendants had no title to the oats so purchased, and no lien thereon, until they were consigned to them by W. *Ades v. Demorest*, 438
2. Until consignment, in such a case, the lien of the consignee does not attach. *ib*

CONSTITUTIONAL LAW.

1. The act of the legislature, of April 20, 1866, (*Laws of 1866, ch. 876*), being the tax levy for that year, is a private or local bill, within the meaning of the constitution, and section 9 restricting the power of the corporation of New York to make contracts, relates to a subject not expressed in the title of the act, and is therefore unconstitutional. *INGRAHAM, J.*, dissented. *Pullman v. The Mayor of the City of New York*, 169
3. A proceeding against a vessel by name, whatever may be the nature of the claim, being a proceeding in the nature of a suit in admiralty, a statute passed by a state legislature, conferring the right to a lien on a vessel, and to proceed against her by name, whatever may be the nature of the claim, is unconstitutional and void. *Ferran v. Hosford*, 200
3. The act of the legislature of 1861, creating a board of revision, is not void as infringing the constitution of the state. The subject of the act is expressed sufficiently in its title. It is, "An act relative to contracts." *Matter of the application of Tappan*, 225
4. Neither the officers created by the act of April 12, 1867, "to consolidate the several school districts and parts of districts within the corporate limits of the village of Saratoga Springs, and to establish a free union school or schools therein," (*Laws of 1867, ch. 853*), nor the trustees of school districts within that village, are county, city, town or village officers, within the meaning of the first and second branches of section 2 of article 10 of the State constitution. *The People ex rel. The Board of Education of Saratoga Springs v. Bennett*, 480
5. The third branch of section 2 of said 10th article of the constitution embraces, in its scope and language, not only trustees of school districts, but also all officers whose offices might be thereafter created; such as boards of education, and the like. *ib*
6. Hence, whether the officers named in the act of April, 1867, are called school trustees, or members of "the board of education," or by any other name, title or character of school officers, and though possessing by their creation substantially the same

powers, and exercising or attempting to exercise, the functions or duties of school trustees, the legislature did not transcend its legitimate powers by the enactment of the said act, and in the creation of a board of education consisting of the persons named, with the powers therein conferred. *ib*

7. Whether the board of education thus created possesses more or less powers than ordinary school district trustees, they are clearly brought within the third branch of section 2, article 10 of the constitution, as officers "whose offices may hereafter be created by law," and may therefore be appointed by the legislature. *ib*

8. The act of April 12, 1867, is not unconstitutional and void as being in violation of section 18, article 8 of the State constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." *ib*

9. Although the act in question is local, being confined to a particular locality, yet it embraces but one subject, viz., the establishment of a free union school or schools, within the limits specified. *ib*

10. The act of the legislature "in relation to the plank road law in the county of Saratoga," passed February 27, 1864, which enacts that "if any plank road in Saratoga county, used for six years, shall be abandoned, or its charter expire by its own limitation, or forfeiture, such plank road, and its right of way, shall become and is hereby declared a public highway," and makes it the duty of the commissioners of highways of the town to take the same measures for appraising the reverend interest of the owners whose lands were taken for such plank road, &c., as are required by the statute in relation to the appraisal of damages for laying out public highways, &c., is not unconstitutional. *The People ex rel. Mitchell v. Laurence, 589*

11. It is not in conflict with any express provision of the constitution, nor an infringement of any natural right. *ib*

12. Statutes free from these objections cannot be declared void by the courts. Within this limit, the legislative will is sovereign. *ib*

See PRACTICE, 2.

CONTEMPT.

1. If service of an order for the defendant to appear before a referee and submit to an examination as to his property, is made without exhibiting to him the original order of the judge, the service is only irregular; not a service which the defendant is at liberty to disregard, but one which he can object to, and have set aside, by appearing and taking the objection. His failure to take the objection is a waiver of it. *Billings v. Curver, 40*

2. While there is no rule or practice which absolutely protects a party from punishment for a violation of an order, committed upon the advice of counsel, yet substantial justice, and the wise exercise of the discretion vested in the court, require it to relieve a party when the effect of his counsel's mistake may be to keep him in jail indefinitely, by reason of his inability to pay a large sum of money. *ib*

3. Accordingly, where a defendant was adjudged guilty of contempt in failing to appear and submit to an examination, as to his property, and it was shown that such failure was caused by the advice of counsel given in good faith and in good faith relied upon by the defendant, the order was modified so as to direct that the defendant be adjudged guilty of the contempt charged, and be fined, unless he appeared and submitted to an examination under the original order, and made an affidavit to the effect that he had made no transfer of his property, since the order for his examination, except and unless under the provisions of the bankrupt act. *ib*

CORPORATION.

1. In an action against a corporation, by a stockholder, to have his con-

tract of subscription rescinded and the amount he had paid refunded to him, on the ground that the company did not acquire or own certain pieces of property which it was represented it would acquire, the judge charged the jury that if, upon the prospectus, "the plaintiff had the right to believe that it was reasonably certain that the company would acquire such property, and that the company was organized with a view to ownership of those pieces of property, then, if they did not obtain it, he would be entitled to recover." *Held* that the charge was erroneous. *Kelsey v. Northern Light Oil Company*, 111

2. A corporation being about to be formed, for the purpose of dealing in and developing oil, in oil lands, certain named property was expected to constitute its invested capital. After it should become organized it was to purchase the several pieces of oil property mentioned in the prospectus. It succeeded in obtaining all, except one piece, as to which there was some defect of title. *Held*, that in the absence of any misrepresentation or fraud, a stockholder could not, on the ground of the failure of the company to acquire all the land mentioned in the prospectus, maintain an action against it to recover back the amount paid by him upon his subscription. *MULLEN, J.*, dissented. *ib*

3. Such an action cannot be sustained unless the objects and purposes of the company have so entirely failed that the corporation may be said to be virtually dissolved. *Per PECKHAM, J.* *ib*

4. Where there is, at most, a failure only as to about three fourths of one tenth of the property intended to be owned by the company, and the money to buy that is in the company's treasury, this is not a sufficient ground for dissolving the corporation. *Per PECKHAM, J.* *ib*

See MUNICIPAL CORPORATIONS.
NEW YORK, (CITY OF.)

COUNTY COURT.

See APPEAL, 1.

CRIMINAL LAW.

1. The principle of the rule laid down in *The People v. Erwin*, (4 Denio, 129,) viz., that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the keeper of a bawdy house, applies to any person who is personally concerned in the keeping of such a house. *Loewenstein v. The People*, 299

2. In misdemeanors there are no accessories; all who procure, counsel, aid or abet the commission of the crime are principals. *ib*

3. One who has the control of premises, and knowingly rents a building thereon for, and permits it to be used as, a house of prostitution, cannot screen himself from punishment by showing that he did not own the premises, but rented the same and collected the rents merely as agent for the owner. *ib*

4. Although a statutory offense is not charged, in the indictment, in the very words of the statute, yet if the substance—the substantial facts constituting the statutory offense—are well stated, that is sufficient. *Freder v. The People*, 806

5. Where an indictment contains some good counts and the jury find a general verdict of guilty, the conviction will be sustained, however defective the other counts may be; as the verdict will be applied to the good counts. *ib*

6. Any pregnant woman who shall take any medicine or drug for the purpose of procuring a miscarriage, is guilty of a criminal offense, of the same grade as that of a person administering medicine or drugs to her for that purpose, and is liable, upon conviction, to the same punishment. *ib*

7. The submission by a pregnant woman to an operation, or the taking of drugs, with intent to procure a miscarriage, is a moral as well as a legal offense; and that, with her confessed want of chastity, is an impeachment of such female, when examined as a witness against another,

- on an indictment against him for administering medicines and drugs to her, and renders a corroboration proper, even if it be not indispensable. ib
8. The testimony of the physician who was present at the birth of the child, as to the fact of the birth, and his attendance, upon the employment of the defendant, is not corroborative of the female's testimony in respect to the guilt of the defendant, in previously attempting to procure a miscarriage. Hence, a charge to the jury that such evidence is corroborative of the testimony of the female in respect to "the defendant's intent and connection with the alleged offense," is erroneous. ib
9. A corroboration, to be of any avail, should be as to some matter material to the issue. To prove that a witness has told the truth as to immaterial matters, has no tendency to confirm his testimony involving the guilt of the party on trial. ib
10. The duties devolved upon commissioners of excise by the "act to suppress intemperance and to regulate the sale of intoxicating liquors," (*Laws of 1857, ch. 628*), call for the exercise of discretion and judgment, and are, to some extent, discretionary and judicial. *The People v. Jones*, 811
11. The commissioners cannot be coerced in the exercise of their discretion, by mandamus or otherwise, and for a mere mistake are not liable, either civilly or criminally. But for an unlawful and corrupt exercise of the powers vested in them, they are answerable criminally. ib
12. They cannot willfully and knowingly violate the law with impunity; and while they are only responsible for good faith and integrity, they cannot, from corrupt motives, either grant or withhold a license improperly, and shield themselves under the judicial character of their office. ib
13. The words "inn, tavern or hotel," contained in the act of 1857, are used synonymously, to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied. The words "inn or tavern" were so used in the prior corresponding enactments. ib
14. To constitute an inn-keeper, a tavern-keeper, or hotel-keeper, the party so designated must receive and entertain as guests those who choose to visit his house. A restaurant, where meals are furnished, is not an inn or tavern. *Per ALLEN, J.* ib
15. It by no means follows that because the place was an unfit place for a tavern, or the license was im- providently or improperly granted, the commissioners of excise were necessarily guilty of a criminal offense in granting a license. ib
16. To constitute an offense, the license must have been granted with full knowledge of the facts, and willfully. ib
17. The offense consists in the motive and intent with which the act was done. The mere granting of a license which a court or jury might say ought not to have been granted, is not an offense; but the jury must be able to say, from the evidence, that the commissioners, or such as are pronounced guilty, knew, at the time, that it was not a proper case for a license under the statute, and nevertheless granted it, in willful disregard of the statute; that is, that they knowingly and purposely disregarded the statute. ib
18. If they acted in good faith, though erroneously, they cannot be punished. ib
19. They have the power to do the act, and only a criminal intent can make the act criminal, although erroneously done. ib
20. On the trial of an indictment against commissioners of excise, for willfully, unlawfully and corruptly granting a tavern license, the court charged the jury, in substance, that if they should find that the defendants knew the character of the place licensed, yet if they believed, from the evidence, that the defendants thought the place a fit and proper

- one to be licensed as a tavern, under the statute, they should acquit; but if the jury, from the evidence, believed that the defendants did not consider the premises in question fit and proper to be thus licensed, but willfully and corruptly licensed the same, in violation of the statute, they should find the defendants guilty; *Held* that this portion of the charge was correct. 33
21. But that it was erroneous to charge the jury that if the act was unlawful; that is, if the license ought not to have been granted, under the statute, and the defendants intended to do the act, viz., to grant the license, they should be convicted; that they could not shield themselves because they did not suppose the act was in violation of law, or because they mistook, or were ignorant of the law, or because they supposed they were acting according to the statute. 33
22. The statutory regulations for the drawing and summoning of jurors were not made for the benefit of parties to trials by jury and for the purpose of securing to such parties (in civil and criminal proceedings) an impartial array of jurors from which the jury to try the issue might be taken, but were made for the purpose of securing an impartial distribution among citizens of the onerous duty of performing jury service. *Friery v. The People*, 319
23. Hence, in the absence of any suggestion of fraud or of misconduct, other than the mere failure to observe the regulations, the public, only, can complain that the regulations have been disregarded. A challenge to the array, by a prisoner on trial, will not lie for a disregard of the directions of the statute. 33
24. The property or assessment qualifications of jurors, prescribed by the Revised Statutes, have been repealed, in respect to the city of New York. 33
25. Where jurors are challenged for principal cause or for favor, and upon the triors finding against the challenges, the jurors are challenged peremptorily, by the prisoner, the questions raised previous to the peremptory challenges are not open for examination at the instance of the prisoner. 33
26. Intoxication is never an excuse for crime. Even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. 33
27. Where the killing of another is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime. 33
28. Where, on the trial of an indictment for murder, evidence is offered to show that the prisoner killed the deceased in self defense, and that he feared the deceased intended to attack him, the rule is that the prisoner must have had reasonable ground for believing the deceased intended to take his life, or to do him bodily harm, and that there was reasonable ground for supposing the danger imminent that such design would be accomplished, although it should afterwards appear that no such design existed—that there was no real danger of its being perpetrated. *The People v. Lamb*, 342
29. It is not material whether the prisoner's impressions were correct or not; but the true inquiry is whether he had reasonable grounds to suppose he was in danger, and, if such grounds existed, whether the danger was imminent, or whether he could have avoided the danger by departing. 33
30. The rule does not permit a jury to convict if they find the prisoner was not justified in forming such an opinion; nor if they are satisfied that the circumstances did not warrant the conclusion; nor if the impressions which the prisoner formed were incorrect. 33
31. Their attention should be directed to the inquiry whether the prisoner had any reasonable grounds for forming such an opinion. If he had, then whether the prisoner was justi-

fled in forming such an opinion, and whether the impressions formed were correct, would be immaterial. *ib*

82. A charge to the jury that if the prisoner's impressions, as to the existence of danger to himself, were correct, they were a protection, but that if incorrect they afforded him no immunity or protection, was *held* to be erroneous, as it might have led the jury to suppose, if the opinion or impressions formed by the prisoner were wrong, and that he was *not in reality* in danger of some great bodily injury, that his impressions would afford him no protection. *ib*

83. On a trial for murder, in the absence of any evidence that the deceased had assaulted the prisoner, evidence to show that the deceased was of a quarrelsome, vindictive and brutal character, is inadmissible. *Per SUTHERLAND, J.* *ib*

84. The good character of a prisoner cannot avail against clear proof of guilt. It is only where doubt exists as to the commission of the crime, and the intent of the party, that good character will protect him. *Wagner v. The People,* 867

85. An indictment charging the crime upon the "oath" of the jurors is sufficient. Although "oaths" is the proper word, using the singular, instead, is such a defect as, after verdict, will be cured by the statute. *ib*

86. The objection that the crime was not shown to have been committed in the county alleged in the indictment, cannot be taken for the first time upon a writ of error. *ib*

87. So as to the objection that the witnesses do not state the year in which the fatal injury was inflicted, to show that it produced death within a year and a day; where there is sufficient evidence from which, if necessary, the jury could infer the killing to have been in the year alleged in the indictment. *ib*

88. On the trial of an indictment for murder, evidence as to the existence of ill feeling between the prisoner's wife and the wife of the deceased, is not admissible, unless the proof

shows that the prisoner had a knowledge of such ill feeling. *Hackett v. The People,* 870

89. If there is no proof of such knowledge, the prisoner's counsel may on that account ask to have such testimony stricken out, and to have the jury instructed to disregard it. And although no such request be made, the evidence will be held to have been improperly received. *ib*

40. Dying declarations relating to the transaction, and circumstances attending the homicide, are admissible on a trial for murder. *ib*

41. So declarations that the prisoner's boys followed the deceased in the street, and clubbed him on the corner, where such act immediately preceded the meeting with the prisoner, and was the cause of his returning to his house, where the blow was struck, are admissible, as being strictly a part of the *res gesta*—the immediate cause which led to the meeting. *ib*

42. But a declaration that the prisoner had often threatened to kill the declarant—such declaration being made after the latter had related the circumstances of the stabbing, and being entirely unconnected with it, without any thing to show whether the threats were made to the declarant, or to others who had told him—is inadmissible. *ib*

43. It would be adopting a dangerous precedent to extend the rule which admits declarations made under a conviction that the party must die, beyond the immediate transactions which led to the death. *Per INGRAM, J.* *ib*

D

DAMAGES.

See TROVER AND CONVERSION, 5.

DEED.

1. The premises intended to be conveyed by deeds were described as

being 200 acres, more or less, in the right of W., K. & C., in lot No. 1, in the 24th allotment of the patent of K. *Held* that as this description contained several particulars, no lands could pass by the deeds, except such as corresponded with all the particulars. *Finley v. Cook*, 9

2. That it was necessary that those claiming under such deeds should show that the lands claimed were in lot 1, and in that part of the lot to which the right of W., K. & C. extended; and if such right included more than 200 acres, the grantees would have been authorized to elect which 200 acres in the tract they would take, and such election would have made the grant operative, although the description was so uncertain that, of itself, it would convey nothing. *ib*

3. And no evidence being given, as to what part of lot 1 was covered by the right of W., K. & C., it appearing that K. alone claimed lot C in lot 1, but the lands conveyed were not a part of those claimed by K. alone; it was *held* that the deeds were ineffectual to establish the plaintiff's title to a particular portion of lot C in lot 1. *ib*

4. The return of a deed to the grantor, and the destruction thereof, after it has been executed and delivered, will not reinvest the grantor with the title. *Parshall v. Shirts*, 99

5. Where persons acknowledging the execution of an instrument, although previously unknown to the officer, are introduced to him by a mutual acquaintance, this, if it satisfies the conscience of the officer as to the identity of the parties, is sufficient to authorize him to take the acknowledgment and give the certificate. *CLERKE, P. J.*, dissented. *Wood v. Bach*, 184

6. Although the statute requires that the officer taking an acknowledgment shall know, or have satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed the instrument, yet it nowhere prescribes either how such knowledge shall have been acquired,

or that it must have existed for any definite period of time. *Per CARDOSO, J.* *ib*

7. That is necessarily a question for the conscience of the officer; and the means through which he obtains knowledge of the person's identity are not material. *ib*

8. The right of the officer to take the acknowledgment does not depend upon the length of his acquaintance with the person, nor upon the manner in which his knowledge is acquired. *ib*

See TRUSTS AND TRUSTEES, 1, 4, 8.

DESERTERS.

See FALSE IMPRISONMENT, 4, 7.

E

ESTOPPEL.

An *estoppel in pais* arises when a party has made representations, or done acts to influence the conduct of another, by inducing a belief of a given state of facts, when such party, having acted upon such belief, would be injured by showing a different state of facts. *Rice v. Dewey*, 455

See FALSE IMPRISONMENT, 7.
MUNICIPAL CORPORATIONS, 5.

EVIDENCE.

1. Although a letter, written by a third person to the plaintiffs, is not competent as proof of the truth of the facts stated in it, yet it is admissible to show under what cover its contents reached the plaintiffs; precisely as an envelope would be admissible as having contained a certain letter. *CLERKE, P. J.*, dissented. *Darling v. Miller*, 149

2. A plaintiff, when examined as a witness, may be asked whether one of the loans for which the notes sued on were given was an individual transaction; and whether he loaned

the money as his own, or as receiver; those inquiries embodying a fact within the knowledge of the plaintiff, and not requiring the expression of an opinion upon the law of the case. *Davis v. Peck*, 425

See CRIMINAL LAW, 7, 8, 9, 33, 34, 37 to 43.
WITNESS.

EXECUTORS.

See SURREGATES, 3.

F

FALSE IMPRISONMENT.

1. The question of probable cause, in actions for false imprisonment, has been settled as an important one, by the common law, from time immemorial. The absence of probable cause was always alleged, in the declaration, and was a necessary allegation. *Per* POTTER, J. *Hawley v. Butler*, 490
2. An important distinction is recognized, in this class of cases, both in the English courts and in our own, viz., the distinction between an arrest made by, or at the instance of, a private person, and one made by magistrates or other police or public officers, where the defense pleaded is, probable cause for the arrest. *ib*
3. If an innocent person is arrested upon suspicion, by a private individual, such individual is excused, if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest, without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. *ib*
4. What circumstances were held, in this case, to amount to probable cause for the plaintiff as a deserter. *ib*
5. In an action for false imprisonment, the question whether the defendant

had probable cause for the arrest, upon undisputed facts, is a question for the court, not for the jury. If the facts are in conflict, the jury must find the facts, and when found, it is a question of law whether they amount to probable cause. *ib*

6. It is not settled as a question of law, that, without reference to the pressing duties, and the demands upon the time, of public officers, and their necessary attention to other business of the public, four days is such an unreasonable detention as to make the officer guilty of violating the language of a statute specifying no time, and to render him liable for false imprisonment. *ib*
7. The plaintiff being arrested as a deserter, and put in a lock-up until he could be sent to the nearest military post, asked permission to stay there until he could hear from Boston, rather than be sent a distance of 170 miles to a military post, and there take the chances of a still longer delay, in confinement. Permission was given accordingly, and he remained in the lock-up four days, when he was discharged. *Held* that this furnished a legal excuse for the detention, if it did not completely estop the plaintiff from bringing an action for false imprisonment. *ib*
8. Where probable cause for an arrest is shown, whether it appear from extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer, acting without malice or bad motive, will be protected, if acting in the line of his duty. *ib*
9. The unreasonableness of the time of detention is a distinct question from that of the first arrest, if the arrest itself can be justified. *ib*

See PROVOST MARSHALS.

FALSE REPRESENTATIONS.

See FRAUD.

FRAUD.

1. Where the gravamen of an action was that the defendant, by false rep-

representations induced the plaintiff to labor for him, under the belief that the defendant was solvent and able to pay the price agreed upon for such work, and stated that he owned the farm, as an evidence of such ability, yet there was no proof of the defendant's insolvency, or inability to pay for such labor, but on the contrary his responsibility affirmatively appeared; *Held* that unless the defendant was insolvent or unable to pay, no fraud was perpetrated upon the plaintiff; and that it was therefore erroneous for the judge to charge that "if the jury found that the defendant was not the owner of the farm, it was a misrepresentation which would justify their finding for the plaintiff;" the assertion of a falsehood as to the defendant's ownership of the farm, of itself producing no injury to the plaintiff. *Taylor v. Saville*, 84

2. To entitle a party to recover for fraud or deceit, there must have been an assertion of a falsehood, with a fraudulent design, as to a fact, with a direct and positive injury arising from such assertion. 85

See JUSTICES' COURTS

H

HIGHWAYS.

1. Whatever opinion may be entertained as to the remedies provided by the act of the legislature of May 9, 1867, (*Laws of 1867, ch. 814*), amending the act of 1862, entitled "An act to prevent animals from running at large in the public highways," in relation to private trespasses—concerning which, *it seems*, the act in its amended form is not obnoxious to judicial condemnation—it is beyond question that, as applied to the case of animals at large in the highways, the provisions of the act of 1867 are clearly within the legislative authority, as a just and beneficent exercise of the police power of the government. *Campbell v. Evans*, 566 N
2. Where animals are running at large upon the highway, and are seized by

the overseer of highways in the district where found, such a case is not only not within the principle decided in *Rockwell v. Nearing*, but is expressly excepted from it in the opinions of both the judges, rendered in that case. 85

3. Where animals are found running at large in the highway, and seized by the overseer of highways, and thereupon complaint is made in writing by him, stating the facts, to a justice of the town, it is not necessary the complaint should state that the animals were running at large "by the sufferance or permission of the owner." 85
4. The question whether the escape has been suffered or permitted by the owner is not a jurisdictional fact. 85
5. The first section of the act makes it unlawful for animals to run at large on the highways, and imposes upon overseers the duty of seizing and taking such animals into their possession; and this is the only fact necessary to be shown, to justify the officer in making the seizure. If the complaint shows this, it gives the justice jurisdiction, in the very words of the statute, to hear and determine the matter. 85
6. An affidavit, made by the person serving a summons issued by a justice of the peace, under the act of 1867, and indorsed thereon, stating that he has served the same, together with proof that such person is a constable, is sufficient to authorize the justice to proceed with the case; although it does not appear by the return that the person making it was a constable. 85
7. The 3d section of the act of 1867, which provides that service of the summons shall be made by posting the same in at least six public and conspicuous places in the town, and that one of said places "shall be the nearest district school-house," obviously means the district school-house nearest the *place where the seizure was made*—not nearest to the justice's office. 85
8. A return stating that the officer served the summons "by posting a

copy thereof in six public and conspicuous places in said town, one of said places being the district school-house nearest to said premises," being in the very words of the statute, is to be understood as having conformed to it, and is therefore sufficient. *ib*

9. Wherever there are more than one commissioner of highways, in a town, notice of appeal from an assessment of damages, under the highway act, must be served on each and all of the commissioners. If there are three commissioners, service upon one alone is not sufficient. *The People ex rel. Mitchell v. Lawrence*, 589

10. This notice and service is a condition precedent to jurisdiction. Without it, no authority exists for drawing and summoning a panel of jurors, and the justice has no authority in the premises; nor have the jurors summoned and drawn, any jurisdiction of the subject matter. *ib*

See PLANK ROADS.

HOUSE OF REFUGE.

1. A commitment of a juvenile offender to the House of Refuge, in the city of New York, need not specify the period of imprisonment. The law fixes that, by directing that persons committed to the House of Refuge shall be detained in its custody as follows: males until their majority, and females until the age of eighteen years. *The People ex rel. The Society for the Reformation of Juvenile Delinquents v. Deynen*, 105

2. Hence a commitment sending to the House of Refuge, "to be dealt with according to law," a person under sixteen years of age, who has been convicted of a misdemeanor, is right and proper. *ib*

HUSBAND AND WIFE.

1. The separate property of a married woman is not liable for her husband's debts; much less for his torts. It cannot be charged with a debt fraudulently contracted, with-

out her privity, sanction or adoption, whether such fraud be committed by her husband, or any of her relatives. *Corning v. Lewis*, 51

2. Where the husband purchased of the plaintiffs materials for repairing a dwelling-house owned by his wife and situated on her land, upon the false representation that he was the owner of the house and lot, and gave his own note for the amount; his wife not being privy to the transaction, not knowing where, or how, he obtained the materials, and never sanctioning her husband's act, nor promising to pay the debt; *Held* that the wife's separate estate could not be charged with the payment of the debt; although the materials for which it was created were applied to the improvement of such estate. *ib*

See TRUSTS AND TRUSTEES, 1, 2, 8.

I

IMPRISONED DEBTOR.

A debtor imprisoned on proceedings under the act of 1831, "to abolish imprisonment for debt" &c., cannot be discharged from imprisonment under the provisions of the Revised Statutes, relative to "Proceedings by creditors, to compel assignments" by imprisoned debtors. (2 R. S. 24, §§ 18 to 16.) *The People ex rel. La Torre v. O'Brien*, 88

INFANTS.

1. The contracts of an infant are voidable only, and not void. They are subsisting liabilities, requiring, however, ratification after the infant becomes twenty-one, in order to be enforced. *Flynn v. Powers*, 550

2. An infant took a conveyance of land on which there was a subsisting mortgage, which she assumed and agreed to pay, as a part of the purchase money. Subsequently, while still an infant, she sold the land to a third person, who agreed to pay the mortgage. After she became of age, the mortgage was foreclosed, and she being made a party to the fore-

closure suit, appeared by attorney, but put in no answer, and judgment was entered against her, as if she had been an adult. *Held* that, having been silent when she might have spoken, and having suffered the complaint in the foreclosure suit to be taken as confessed against her, the defendant determined that the act done by her in infancy should stand; and that after having taken her chance for a surplus, to herself or her grantee, as if the conveyances were good, it was too late for her to set up the defense of infancy, to escape the payment of a deficiency. *ib*

INJUNCTION.

See JOINT STOCK ASSOCIATION,
2, 8, 4, 5.
NEW YORK, (CITY OF,) 1.

INN-KEEPERS.

See CRIMINAL LAW, 14.

INTOXICATION.

See CRIMINAL LAW, 26, 27.

J

JOINT STOCK ASSOCIATIONS.

1. The articles of association of a company prohibited the union or consolidation of the company with any other, without the consent of a majority of the stockholders. But they contained a clause providing for an amendment of the articles, by a concurrent vote of two thirds of the executive committee and a majority of the trustees. *Held* that the authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. And that such authority to amend should be construed as intended for such amendments as were pertinent to the business and

objects for which the association was organized. *Blatchford v. Keen*, 42

2. In such a case, a merger of the company in another, without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors; and if the union has not been substantially executed, by a transfer of property, and by a large number of the stockholders, it will be enjoined until the final hearing of the case. *ib*

8. But, so far as a transfer of the property has been made, the new company will not be enjoined from the use of the property, or from receiving from any of the stockholders of the old company a surrender of the stock held by them, to the new company, and a voluntary compliance with the terms of the agreement, on their part. And if the stockholders who have not yet accepted of the terms agreed on between the two companies elect to do so, and to become stockholders in the new company, they will not be restrained from so doing; but in regard to property not delivered the injunction will be continued, and the directors and executive committee will be restrained from enforcing any compliance with the terms of consolidation by the plaintiff and other shareholders who are not willing to become members of the new company, by collecting assessments on the shares of stock, or in any other manner, until the decision of the case. *ib*

4. It is no objection to the continuance of the injunction that the company with which the merger is made, and its stockholders, severally, are not made parties to the suit. That company is not in any way interfered with by the proceedings, and its interest, if any, is so remote that it affords no grounds for relief to a plaintiff suing in behalf of himself and others who may choose to come in, and who may not have become stockholders in the new company. *ib*

5. Nor is the failure to make all the stockholders defendants, a good objection to the continuance of the injunction, where they are very numerous, and the defendants who are

- named represent the executive committee and directors, who are in favor of the union of the two companies, and can litigate for the benefit of the other class. 35
6. The executive committee of a company have no right to vote money to themselves, in addition to their regular compensation, for their services as promoters and originators of the company, or in consideration of the members retiring from the executive committee. And if large sums are granted for those purposes, this affords a good reason for the appointment of a receiver. 35
7. Where a note, made by one member of a joint stock association and indorsed by another for the purpose of raising money for the use of the association, is paid and taken up by a third, the latter cannot maintain an action against the maker and first indorser, to recover back the money advanced by him, until an account has been taken between the parties. *Orator v. Binsinger*, 155
4. A judgment, or any matter of record, like a specialty, cannot be discharged, even by what would be considered a good accord and satisfaction in other cases. 35
5. The defendant, being sued as sheriff, for taking and selling on execution property of the plaintiff claimed to be exempt, justified the taking by virtue of an execution issued to him as sheriff, out of the county clerk's office, "commanding him to collect of the goods and chattels of D. &c. \$60.84, which P. recovered against them, for damages and costs, on &c., before M., a justice of the peace, &c., a transcript of which was duly filed and judgment docketed in the clerk's office," &c.; not expressly setting up as a defense the judgment on which the execution was issued. The plaintiff having proved, on the trial, the levy upon and sale of his team of horses, wagon and harness, by the defendant; that he was a householder, having a family; that such team was used in their support, and that he had no other property, except some household furniture worth about \$50; and that he forbade the sale, claiming the property to be exempt; the defendant offered to prove that the execution "was issued upon a judgment rendered on a note which was given for another horse, which was the plaintiff's exempt team." *Held* that the judgment not having been set up in the answer as a defense, nor alleged to have been for the purchase price of exempt property, the judge was right in refusing to allow the defendant to show its consideration, as a defense to the plaintiff's claim of exemption from levy and sale, on execution, of the property in suit. *Dennis v. Snell*, 411

JUDGMENT.

1. The return of a deed to the grantor, and the destruction thereof, after it has been executed and delivered, will not reinvest the grantor with the title. And if, before any conveyance of the premises is made, by the grantee, a judgment is recovered against him, the same will become a valid lien thereon, and a purchaser, at a sale on the execution issued upon such judgment, will acquire a valid title to the premises, as against the judgment debtor. *Parshall v. Shirts*, 99
2. If the grantee, after selling his interest in the premises to a third person, becomes a tenant of the latter from year to year, his right of possession becomes subject to the lien of the judgment, and may be recovered by the purchaser of the premises at the sheriff's sale. 35
3. The holder of a judgment cannot legally bind himself, by any species of executory agreement, to accept a less sum than is actually due thereon and discharge the judgment; *see* *Garvey v. Jarvis*, 179
6. The existence of the judgment, in such a case, is new matter, and requires to be pleaded. 35
7. When an officer sees fit to go beyond the power of the process, or for any other reason, when sued, it becomes necessary for him to prove a judgment, he, no more than any other party, can do so, without having alleged its existence, in his answer. 35

8. Where the real defense is new matter, viz., a justification for taking property under a judgment and execution, if the defendant is an officer, and relies entirely upon the execution, as a defense, and nothing beyond it, it is sufficient for him merely to set forth the fact; but if he desires to go farther, or it becomes necessary to inquire into the consideration of the judgment, he must plead such judgment, and set it forth in his answer. And having averred the existence of a judgment, he will be at liberty to prove it, and then to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff. *ib*

JURISDICTION.

1. It is now settled that the courts of this State have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States. *Dewitt v. Buchanan*, 81

2. As a question of law, the Supreme Court has jurisdiction of torts committed in a foreign country, between non-resident foreigners; but, as a matter of policy, will only exercise it in its discretion, in exceptional cases. *ib*

3. But where the question arises upon demurrer to a pleading, no papers except the pleadings are properly before the court, and if any special reasons exist for retaining jurisdiction, they would not, and could not, properly appear. The court has power to determine the sufficiency of the pleading only. *ib*

4. Upon a motion to dismiss the complaint, however, the special reasons, if any, for retaining jurisdiction, can be set forth in the opposing affidavits, and the court has a discretion to adjudge whether it will retain jurisdiction of the action or not. *ib*

5. To determine whether a debt contracted for the benefit of a vessel is within the sphere of maritime jurisdiction, it is not necessary to ascertain for what purpose, or for whose use, it was contracted. If the pro-

ceeding is *in rem*, and against the vessel by name, this is exclusive, and *per se* shows that it is one of maritime jurisdiction, and exclusively within the jurisdiction of the district courts of the United States. *Farran v. Hoeford*, 200

6. When the proceeding is against a vessel by name, whatever may be the nature of the claim, it is a proceeding in the nature and with all the incidents of a suit in admiralty, and all such proceedings are exclusively within the jurisdiction of the district courts of the United States. *ib*

JUSTICE'S COURTS.

Where the issue in a justice's court is fraud, and the title to land only collateral—a fact from which the main issue may be inferred—evidence of title in another, instead of the defendant, may be received. *Taylor v. Scoville*, 84

JUVENILE DELINQUENTS.

See HOUSE OF REFUGE.

L

LEASE.

1. A lease provided that if the lessee, having performed his covenants, should give notice in writing, on or before February 1, 1868, binding himself to take and accept a further term of five years from May 1, 1868, the lessor would grant a new lease for such further period. It then provided for the fixing of the rent by arbitration, &c., but gave no option to the lessee to accept or reject the lease after the arbitrators should have acted. *Held* that the lessee's obligation to take the new lease became perfect as soon as he gave the notice binding himself to accept another lease for the further term. *Vianey v. Ferran*, 529

2. That the moment that notice was given, the obligation of the lessor to grant, and of the lessee to take, the

new lease became perfect and mutual. *ib*

3. That the appointment of arbitrators being an act only to be done after notice that the new lease was to be taken, neither party, after making the appointment, could be heard to assert that the notice had not been given. *ib*

4. If, in such a case, the arbitration having been commenced, falls through, by reason of the inability of the arbitrator to complete it, and the failure of the parties to agree upon another arbitrator, the lessee may maintain an action to compel a specific performance of the agreement to execute a new lease, at a rent to be settled and determined upon a reference. *ib*

See RECEIVER, 4, 5.

LETTERS.

See EVIDENCE, 1.

LICENSE.

See CRIMINAL LAW, 12, 15, 16, 17, 18, 20, 21.

LIEN.

See JUDGMENT, 2, 3.

LIMITATIONS, STATUTE OF.

See AMENDMENT, 1.

M

MANDAMUS.

Where trustees of a village, who were required by a statute to raise and collect by tax, in the same manner as other taxes are collected, such sums as a board of education created by such statute deem needful in order to organize and carry on the schools within the limits of said village, on being duly notified by such board of its determination as to the sum needed for the purposes expressed in the act, refused to raise the same by tax; *Held* that they could be compelled, by

mandamus, to do so. *The People ex rel. The Board of Education of Saratoga Springs v. Bennett*, 480

See MUNICIPAL CORPORATIONS, 3.

MERGER.

See JOINT STOCK ASSOCIATIONS, 2, 3, 4.

MORTGAGE.

1. A person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one, for the benefit of the other. *Greenwood v. Spring*, 875
2. S., being indebted to the plaintiff, the latter applied to him personally for a mortgage on certain land, as security for the debt. S. refused to give it. The plaintiff then telegraphed to A. to attach S.'s property for the debt. A. at the time held a power of attorney from S. & K. authorizing him to lease, mortgage, sell, and convey any lands or tenements, &c., that they or either of them had, or that they should afterwards become possessed of, within the State of New York; to make, execute and deliver contracts, deeds, &c.; and to collect and receive all debts, dues, &c. Instead of attaching the property of S., as directed by the plaintiff, A., as attorney in fact for S., executed a mortgage upon the property of S., to the plaintiff, for the amount of his debt, and delivered it to his law partner, for the plaintiff, who afterwards accepted it. *Held* that A. being, by the telegram, constituted the agent and attorney of the plaintiff for collecting or securing the particular debt against S., could not, as the attorney in fact of S., execute a mortgage upon S.'s land, to secure the payment of such debt. And that the mortgage was voidable, and must be declared a nullity, unless S. was to be deemed, by his delay, to have waived that defense. *ib*
3. *Held, also*, that a delay of one year, in setting up the defense, by S., when it was interposed to an action of foreclosure, brought by the mortgagee, was not an unreasonable delay; more especially as the plaintiff

- parted with no new consideration, and there was no evidence in the case from which the court could infer that he had lost any rights, security, benefit or advantage. *ib*
4. *Held, further*, that the power to A. did not authorize him to execute a mortgage as security for a debt or liability of his principal then existing. *ib*
 5. That the plaintiff was not a *bona fide* holder for value; no new consideration being parted with, by him, as a condition for the mortgage, nor any antecedent debt discharged. That it was simply given as security for a prior indebtedness; and that, too, after a refusal by the principal. *ib*
 6. That he held his mortgage as security for an antecedent debt, and took it with full knowledge, as the law presumes, of the nature and extent of the power under which the agent who made it assumed to act; and being beyond the scope of the power, it was void, and could not be enforced. *ib*
 7. If purchasers of land from a mortgagor have a right, as against the mortgagor, to have their land discharged from the lien of the mortgage, at the time of its transfer to an assignee, such right is equally available as against the assignee; the latter taking the mortgage subject to all defenses that existed against it in the hands of the mortgagor. *Rice v. Devoey*, 455
 8. Parcels of land covered by a mortgage and originally subject thereto, will so continue, unless by some act of the mortgagee they are discharged. Whether the mortgagee considers them subject to the lien is immaterial, except so far as it may be evidence of some agreement, act or omission on his part, discharging the lien. *ib*
 9. A mortgagor has the right to sell the mortgaged premises, in such parcels as he chooses; and knowledge by the mortgagee that he is making such sales and receiving the consideration therefor, will not discharge the lands sold from the lien of the mortgage. *ib*
 10. When a mortgagee causes his mortgage to be recorded, he has done all that is required of him, to preserve his lien; and all persons purchasing from the mortgagor, subsequently, are bound, at their peril, to investigate the title and take notice of the mortgage. If they neglect to do this, neither law nor equity can relieve them from the consequences of the omission. *ib*
 11. A finding, by a referee, that sales of land by a mortgagor were made and the consideration therefor received by him, with the assent of the mortgagee, implies something more than the mere non-action of the latter to prevent the sales. It implies that the mortgagee had entered into some agreement respecting his lien, whereby the lands purchased were discharged from the lien. *ib*
 12. A declaration, by the assignee of a mortgage, that he did not suppose, when he purchased the mortgage, that it was a lien upon lots previously sold by the mortgagor, is of no consequence, except as tending to show an agreement, or act, of the mortgagee, discharging the mortgage. *ib*
 13. So as to a promise by him that he will release one of the parcels of land conveyed by the mortgagor; and a declaration that the mortgagor's deed would be good, and that he (the assignee) is going to release several lots, and will have it all done at once; such declaration being only evidence from which it may be inferred that the mortgagee, or his assignee, has agreed to release the lots; provided such inference is warranted by the other evidence in the case. *ib*
 14. Knowledge by a mortgagee of sales of land made by the mortgagor will not estop him from asserting the lien of the mortgage; neither will it estop his assignee. *ib*
 15. A parol arrangement between mortgagor and mortgagee, by which the former is to execute a new bond and mortgage to the latter, leaving out the parcels of land sold by the mortgagor, is a mere verbal contract in regard to an interest in real

- estate; and being based upon no consideration, and in no part performed, is wholly nugatory, so far as the parties thereto are concerned, and cannot aid purchasers from the mortgagor, if not communicated to, and acted upon by, them. *ib*
16. Knowledge, by the assignee of a mortgage, that purchasers from the mortgagor are making improvements upon the lots conveyed to them, will not estop him from asserting the lien of the mortgage thereon. He has a right to presume that such purchasers have examined the records and know of the mortgage, and have obtained security satisfactory to themselves, against the lien. *ib*
17. No case can be found, holding that a mortgagee whose mortgage is duly recorded loses any right by neglecting to give personal notice of such mortgage, to a purchaser from the mortgagor. *Per GROVER, J. ib*
18. When lands sold and conveyed by a mortgagor are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of the mortgage as the land upon which they are made. *ib*

See AGREEMENT, 1, 4.
INFANTS, 2.

MORTGAGOR IN POSSESSION.

See RECEIVER, 1, 2.

MUNICIPAL CORPORATIONS.

1. A municipal corporation, like any other, may enter into any contract within the object for which the corporation was created, except where it is restrained by some legal enactment, and except so far as its contracts may be subject nevertheless to its future exercise of its legislative authority. *Pullman v. The Mayor &c. of the city of New York*, 169
2. Where the board of trustees of an incorporated village consisted of six members, three of whom voted to raise by tax a sum of money required by statute to be raised, and three voted against the raising of the same; *Held* that this act of the

board was, in legal effect, a refusal to raise the required sum, for the reason that a majority did not vote in favor of the requisition. *The People ex rel. The Board of Education of Saratoga Springs v. Bennett*, 480

3. By an act of the legislature, the trustees of a village were authorized and directed to issue the bonds of the village, executed by them, and signed by the president of the village, to a specified amount, bearing an interest not exceeding seven per cent per annum, which bonds were to be payable within thirty years, the interest to be paid semi-annually; and the avails of such bonds were to be used for the purpose of supplying the village with water. A form of bond having been adopted by the trustees, they resolved to proceed, and execute and deliver to the commissioners of construction, bonds of different denominations, to the amount of \$25,000. Bonds so prepared, with interest coupons attached, in the form required by the act, having been signed by the trustees, were presented to the defendant, who was president of said village, for his signature, who refused to sign such bonds and coupons. *Held* that a mandamus would lie to compel the defendant to sign said bonds and the coupons attached. *The People ex rel. Hathorn v. White*, 622

4. One who accepts an office under a village charter, in which there is a reservation of the right to amend, takes the office and becomes liable to perform all its duties, subject to the right of the legislature to amend the charter by imposing new duties upon the incumbent. *ib*
5. And although he is under no compulsion to continue to hold the office, with its additional duties, yet his continuance therein after the imposition of new duties, by an amendatory act, subjects him to the liability to perform them, and estops him from refusing to perform the duties thus imposed. *ib*
6. His performance of the duties of the office, after the going into effect of the new act, is an implied acceptance of the office with its new duties. *ib*

See CONSTITUTIONAL LAW, 1, 4 to 9.
NEW YORK, (CITY OF.)

N

NATIONAL BANKS.

See BANKS AND BANKING. 1 2.

NE EXEAT.

1. Sections 468 and 471 of the Code of Procedure continue the writ of *ne exeat* and the power to issue it, as a statutory remedy, in the *Supreme Court*. CLERKE, P. J., dissented. *Breck v. Smith*, 212
2. Where a defendant does not move to vacate an order for a *ne exeat*, on the ground that he is in custody under the writ, but as having been discharged from custody on giving bail or security to the sheriff; and in his notice of motion he does not ask to have the bail-bond or undertaking given up to be canceled, it is not erroneous for the court to deny the motion; as the writ can do him no harm, if he does not intend to leave the jurisdiction. 43
3. Although the codifiers may have intended to abolish the writ of *ne exeat*, it seems they did not succeed in doing so. 43

NEGLIGENCE.

See CANALS.

NEW YORK, (CITY OF.)

1. An injunction will not be issued to restrain the corporation of the city of New York from entering into a contract, where there is no valid statute preventing the making of such contract, and the case presents no case justifying the interference of the court on the ground of fraud. *Pullman v. The Mayor &c. of the city of New York*, 169
2. The common council of the city of New York are authorized to assess the costs of a local improvement upon the property benefited thereby. *Matter of the application of Tappan*, 225
3. The fees of the officers who do this duty are a part of the costs of the work. 43
4. No confirmation of such assessments, by the common council, is

necessary; that duty devolving upon the *board of revision* created by chapter 806 of the laws of 1861. 43

5. If the names of the owners and occupants of property assessed are the same, in an assessment, as upon the tax lists of previous years, this is all the law requires in respect to the mode of stating the names of owners and occupants. 43
6. The common council has the power, by ordinance, to direct the filling of sunken lots, and in case it deems it necessary, to do the same at the expense of the owners, forthwith. 43
7. It is the duty of the common council to assess the cost of the improvement upon the property benefited, and not to cast that burthen upon the tax-payers at large. 43

See CONSTITUTIONAL LAW, 1.

NOTICE.

If it be held, as it must, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, then it belongs to the legislature to determine, in the particular instance, whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which were taken against him. *Campbell v. Evans*, 566

See ATTACHMENT, 1, 2.
HIGHWAYS, 9, 10.

O

OFFICERS.

1. When an officer sees fit to go beyond the power of the process, or for any other reason, when sued, it becomes necessary for him to prove a judgment, he, no more than any other party, can do so, without having alleged its existence, in his answer. *Dennis v. Small*, 411
2. Where the real defense is new matter, viz., a justification for taking

property under a judgment and execution, if the defendant is an officer, and relies entirely upon the execution, as a defense, and nothing beyond it, it is sufficient for him merely to set forth the fact; but if he desires to go farther, or it becomes necessary to inquire into the consideration of the judgment, he must plead such judgment, and set it forth in his answer. And having averred the existence of a judgment, he will be at liberty to prove it, and then to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff. *ib*

3. There can be no difference in the powers of the same character of officers, whether performing their duties under the general, or the State governments. The common law prevails in both. *Hawley v. Butler*, 490

See CONSTITUTIONAL LAW, 4, 5, 6, 7.
MUNICIPAL CORPORATIONS, 4, 5, 6.

OPINIONS OF WITNESSES.

1. Where a warranty is special, the damages are necessarily special, and must be estimated by the jury, and not by the opinion of witnesses. *Whitney v. Taylor*, 536
2. There being no market value for pregnant mares, for *livery purpose*, a witness cannot be asked the value of a mare in that condition for *livery purpose*, and her value if not in that condition, and then give his opinion as to the difference in value. *ib*

P

PARTNERSHIP.

1. One partner cannot arrest his copartner. The very nature of a partnership forbids this. *Smith v. Small*, 228
2. Each partner is a joint owner, as well of capital as of property purchased with it. If the capital be misappropriated, by a partner, no remedy is furnished by action at law; unless a balance be struck and a promise made, to pay the same. *ib*

3. Where, by an agreement, there is to be a joint contribution of capital, by the parties, and there is a joint ownership of the property, and an agreement to share profit and loss, the parties are partners. *ib*

4. If, under such an agreement, some of the partners receive, from the others, a sum of money to be applied to the purchase of the article in which the parties are to deal, and for the buying and selling of which the partnership was formed, which they fail so to apply, an order of arrest cannot be granted. *ib*

5. Nor will an order of arrest be granted, as between partners, where it appears that the sum claimed of the defendants was only the difference between the price at which the plaintiffs directed the partnership purchases to be made, by the defendants, and the sum actually paid by the latter therefor, and which they claim was to be charged against their share of the profits, upon final settlement. *ib*

6. The rule is well settled that one partner cannot sue his copartner, at law, except upon a balance struck, or an express promise, upon a full settlement of the partnership transactions. *Bull v. Cole*, 858

7. A partnership existing between the plaintiff, W., S. and the defendant, under the name and firm of S. & Co., the defendant and S., on the 30th of Nov. 1853, sold their interest in the firm to the plaintiff and W., who agreed to take the same and pay the debts of the firm, provided the assets should be sufficient. At this time the firm was indebted to J. C. in the sum of \$4000, and to W. C. in the sum of \$2520. J. C.'s debt went into judgment, and the plaintiff and W. paid, upon the execution, \$1500. In January, 1857, the plaintiff, S. and W. met, with J. C., and liquidated the sum due to J. C. at \$2760, and it was agreed between the plaintiff, W. and S. and the defendant, that each should pay one quarter of that sum. The defendant not having paid his share of the debt to J. C., it was, in September, 1857, agreed between the partners that S., W. and the plaintiff should each pay one quarter thereof

to J. C., (being \$182.58 each,) and that the defendant should give his note to each for one quarter. Accordingly, the defendant made his four notes, for \$182.58 each, one payable to the plaintiff, one to S., one to W. and one to J. C., and delivered them to J. C. to be delivered to the payees when they should each secure one quarter of the sum due to J. C. The plaintiff, S. and W. each secured to J. C. one quarter, and J. C. thereupon delivered to the plaintiff and W. two notes for \$182.58 each, being the notes sued on. The debt due from the firm to W. C. went into judgments, which, on the 9th of August, 1865, amounted to \$2894.60. S., the plaintiff, W. and the defendant thereupon agreed with each other, for the purpose of getting time, to put the amount of the judgments into five notes, each agreeing to pay one quarter of each note, as it fell due. Five notes were accordingly executed and delivered to W. C., the first two of which were paid by the parties, as agreed, and the last three were paid by the plaintiff, S. and W. The plaintiff paid one quarter thereof, for the defendant, which the latter afterwards promised to repay him, and W. paid for the defendant the same amount, and afterwards assigned to the plaintiff his note and the claim for the money thus advanced for the defendant. There never was any accounting, or settlement of the partnership matters, between the parties, and the plaintiff and W. had not accounted for the effects of the firm which passed into their hands. *Held* 1. That the contract between the parties, dated November 30, 1863, dissolved the copartnership of S. & Co., and by force of it the assets of the firm passed to the plaintiff and W., who were bound thereafter to pay and satisfy the debts of the firm, provided the assets transferred to them were sufficient for that purpose. 2. That the debts due to J. C. and W. C. being confessedly the proper debts of the firm of S. & Co., as between the plaintiff and W., and S. and the defendant, the two former became, thereafter, the principal debtors, and S. and the defendant sureties for the payment of the said debts, to the extent of the value or amount of the partnership assets received by the plaintiff and W. on the

dissolution of the firm. 3. That, as between themselves, the only claim which the plaintiff and W. could thereafter make against their late partners, was that they should contribute ratably to the payment of such or so much of the partnership debts as should remain unpaid, after all the partnership assets received by them under the agreement had been fully exhausted and applied upon such debts. 4. That the notes so given by the defendant and S. to the plaintiff and W. were, in legal effect, simply accommodation notes, representing no debt or liability from the makers to the plaintiff and W., but were mere obligations of the sureties, in the hands of the principal debtors, for a debt which such principals were themselves bound to pay. 5. That the notes, not being given upon any settlement among the partners, or upon any adjustment of their accounts as between themselves, and there having been no settlement of the partnership accounts, no balance struck, and no promise to pay, they were not legal liabilities as between the partners themselves, and could not be enforced in their hands, as against each other, at law; and the plaintiff could maintain no action on them, or any of them, at law; his only remedy against the defendant being in equity, for the payment of his proportion of any deficiency which might be found due to him after the partnership assets were exhausted. *u*

8. A referee found, as matter of fact, that the defendants were partners in the business of purchasing land in the counties of Wayne and Seneca, and the cutting and sale of wood thereon, from the 24th of January, 1865, until after the 16th of September, of the same year; and that as such partners they cut, or caused to be cut, wood and logs on two lots, and were engaged in the construction of a saw-mill upon one of the lots. *Held*, that upon these facts the referee was warranted in the conclusion of law that the defendants were liable for supplies furnished to, and labor done for, them in carrying on the said business. *Mead v. Shepard*, 474

9. The defendants, H. S., C. S., N. and A., by their agreement in writing,

dated January 24, 1865, became jointly interested in an adventure for the purchase of lands in the counties of Seneca and Wayne, and for the cutting and sale of the wood thereon, on their joint account. H. S. was to be the acting agent of the parties, in the purchase of the lands and in carrying on the business of cutting and selling the wood thereon, and C. S. was to be the trustee for his associates, to receive the title to the lands and to hold possession of all papers and vouchers connected with the said purchases, and with the sales of such land, and to keep and deposit all moneys received or realized, for the use and benefit of the said parties. Under this agreement H. S. opened, and for several months kept open, an office for the purchase of land and the cutting and sale of wood and timber. During this period he purchased various parcels of land, for which he took contracts, or deeds, in his own name. Most of the contracts were afterwards assigned to C. S. The money for the purchase of these lands, and for the carrying on of said business, was paid chiefly by C. S., all of the defendants paying more or less thereof, except H. S., who was not to contribute anything to the original purchase of the lands, but was afterwards to contribute towards the expenses in proportion to his interest. Among other lands purchased by H. C. were two lots called the S. lot and the A. lot. The principal work done by H. C. and by others under his direction, while managing the business, was on those lots; and all the wood cut and timber got out by the men employed by him was on these two lots. *Held*, that in contracting for the purchase of the S. and A. lots, and in cutting the wood and timber thereon, H. C. was performing the duty assigned to him by his associates, for which he opened and kept open said office; and the wood and timber cut on those lots having been so cut for the common benefit of all the defendants, they were responsible for all his contracts with the men hired to labor thereon, and for supplies furnished him to enable him to prosecute such business. *ib*

10. *Held*, also, that upon the above facts being proved, in an action

brought by parties who had performed labor and furnished supplies for the benefit of those jointly interested in the said land, against the latter, to recover the amount thereof, a report of a referee in favor of the plaintiffs, against all the defendants, not only could not be set aside as being against the evidence, but was clearly right, and in accordance with the fair and just weight of the evidence. *ib*

PILOTS.

See COMMISSIONERS OF PILOTS.

PLANK ROADS.

1. The legislature having seen fit to exercise its power of eminent domain, by dedicating abandoned plank roads to the public as highways, the interest which reverts to the original owners of the land, on the abandonment of a plank road, includes everything—the soil, the fences thereon, the right of way, and all the advantages, if any, arising from its former use. *The People ex rel. Mitchell v. Lawrence*, 589
2. It is this property which the legislature has dedicated to the public; and it is this interest which is required to be appraised and compensated for. Hence, it is proper for the jury summoned to reappraise the reversionary interest of the land owners along the line of an abandoned plank road, on appeal from an appraisement made by commissioners appointed by the county judge, to take into consideration the cost of fencing the road, keeping the fences in repair, and the inconvenience to the use of the land arising from the necessity of crossing and recrossing such road. *ib*

See CONSTITUTIONAL LAW, 10, 11.

POSSESSION.

1. Persons in possession of land, under the title of another, are estopped to deny his title, or to set up an outstanding title in themselves or any other person. *Finlay v. Cook*, 9
2. Where a valid constructive possession of an entire lot is acquired by entry under claim of title founded upon a written instrument, and the

actual occupation of a part, it cannot be defeated by a subsequent entry on the same lot by another, who makes an improvement on a part and obtains title to the whole lot. *ib*

8. The effect of such subsequent entry would be to give the person so entering a possession of the part actually occupied and improved, but no further. A constructive possession of the unimproved part of the lot would remain in him who made the first entry under claim and color of title and improved in part. *ib*

See COMPTROLLER'S DEED.

PRACTICE.

1. An objection to the right of the plaintiff to maintain an action must be raised on the trial, if it be capable of being obviated; as where it is possible that new or additional evidence could be supplied, if a defect in the proof were pointed out. *Brookman v. Hamill*, 209
2. But as an objection to the unconstitutionality of an act of the legislature cannot be obviated by any action of the plaintiff, the defendant is not bound to raise the objection, on the trial, that the statute under which the plaintiff sues is unconstitutional. *ib*
3. If the vendee, subsequently to the execution of a written contract, which is declared void by the statutes of Pennsylvania, for being made on Sunday, demand, on a week day, a conveyance of the property and receives the same, promising to pay the purchase price, a new and valid contract arises between the parties, which entitles the vendor to an action to enforce payment. *Hamilton v. Gridley*, 542
4. And where the plaintiff, in such a case, counted upon the contract as being in writing, but was allowed on the trial, without objection, to prove the subsequent conveyance and a parol promise to pay; *Held* that the variance might be disregarded under the provisions of the Code of Procedure. *ib*
5. An order made in an action brought by the plaintiff as a judgment and execution creditor, to set aside an alleged transfer of partnership prop-

erty, for fraud, directed that the defendant produce for the inspection, examination and copying of the plaintiff, *all* the books and papers of the defendant's intestate containing partnership accounts, and also *all* papers, letters, &c., made or signed by the intestate, after a certain date. The affidavit for the discovery neither specified, nor referred to, any particular entry, or to any particular paper; nor did it state any fact or circumstance to show the materiality or necessity of an inspection of all the books and papers. *Held* that the order was too sweeping and general, and the same was reversed. *Phelps v. Platt*, 557

6. *Held, also*, that the plaintiff not being the representative of the deceased partner, but making such decedent's representatives parties defendants, the order could not be justified on the ground that a partner, or his representative, has a right to an inspection of all the copartnership books and papers. *ib*
7. The affidavit for a production and discovery should be made by the plaintiff; or, if made by the attorney, some reason should be shown for his making it. *ib*

See ARREST.
 CONTEMPT.
 RECEIVER.
 REFERENCE.
 REFEREE'S REPORT.

PROBABLE CAUSE.

See FALSE IMPRISONMENT.

PRINCIPAL AND AGENT.

- A person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one, for the benefit of the other. *Greenwood v. Spring*, 375

See AGREEMENT, 1, 2, 3, 4, 5.
 MORTGAGE, 2.
 TELEGRAPH COMPANIES, 5, 8.

PRODUCTION OF BOOKS, &c.

See PRACTICE, 5, 6, 7.

PROMISSORY NOTES.

1. At the time a promissory note was made, the maker and indorser both

resided in Rochester, at which place the note was dated, and it was discounted at the plaintiffs' bank, which was also located there, and where the plaintiffs resided. *Held* that the plaintiffs had the right, when the note matured, to assume that the indorser still resided in Rochester, and to act accordingly in taking the requisite steps to charge him as such, unless they knew that in the meantime he had changed his residence. *Ward v. Perrin*, 89

2. *Held*, also, that the information on that point, possessed by the notary who protested the note, must be deemed information possessed also by the holder of the paper, at the time of its maturity. *ib*

3. And the notary having demanded payment of the note, properly, and given the proper notice to charge the indorser, by addressing it to him at Rochester, and depositing it in the post-office there, so addressed, with the postage prepaid; *Held*, that the indorser was clearly charged and duly fixed as such, unless the plaintiffs, or the notary, knew that he did not then reside in Rochester, but had, during the time the note was running to maturity, removed to another place. *ib*

4. And that question having been fairly submitted to the jury, who found for the plaintiffs expressly on that issue, it was *Held* that this was entirely conclusive. *ib*

5. Where notes given by the defendant to the plaintiff as "receiver of the W. bank," for money lent by the latter upon checks signed by him as "receiver &c.," were indorsed by the plaintiff as "receiver &c.;" *Held* that by such indorsement the title to the notes was transferred to the plaintiff individually, and, *prima facie*, became vested in him; and that, in the absence of any proof to the contrary, the plaintiff was entitled to prosecute them in his individual character; he testifying, without contradiction, that these were individual transactions. *Davis v. Peck*, 425

6. *Held*, also, that such notes having been received in evidence, with the indorsements, without any objection being made that the indorsements were not proved, or any point being taken on that account, the fact that

the plaintiff had used money in his hands as receiver, in making some of the loans on the notes, was not sufficient to establish that they did not belong to him individually; especially where there was evidence to show that on a meeting between the parties in the presence of an accountant, for the purpose of having their accounts looked over &c., and a balance struck, the notes were presented by the plaintiff as an individual claim against the defendant, and were recognized by the latter, as such, without objection. *ib*

See BANKS AND BANKING, 8.
JOINT STOCK ASSOCIATIONS, 7.

PROVOST MARSHALS.

1. Provost marshals appointed under the act of congress of March 3, 1863, and their deputies, are such officers as by law possess the power to arrest an individual, where there is probable cause for believing that he is a deserter. *Hawley v. Butler*, 490

2. A provost marshal is a public officer; his duties concern the public, and are connected with the administration and execution of justice; and his office bears the same relation, in some respects, to the military courts, that sheriffs, marshals, constables and peace officers do to the civil courts. His acts, performed by authority of law, are done by "due process of law," within the meaning of the 5th article of the amendments to the constitution of the United States. *ib*

3. In trying the legality of acts done by provost marshals and their deputies, in the exercise of their duty, great latitude should be allowed; a public duty being imposed upon them, for public purposes, and they being punishable for a neglect of duty, if they fail to act, in a case where there is sufficient or probable cause for acting. *ib*

4. The 7th section of the act of congress of March 3, 1863, (*Laws of the United States*, 1863, chap. 75,) which provides "that it shall be the duty of the provost marshals to arrest all deserters * * * wherever they may be found, and to send them to the nearest military commander or

military post," is, like all other statutes, to be reasonably construed; and it being entirely silent as to the time within which the deserter shall be sent to the military post, the officer is bound to send him within some reasonable period. *ib*

5. What is a reasonable period is generally a question of fact, dependent upon the exigencies of the case. *ib*

See FALSE IMPRISONMENT.

PUBLIC OFFICERS.

See CANALS.

MUNICIPAL CORPORATIONS, 4, 5, 6.
OFFICERS.

R

RAILROAD COMPANIES.

1. W. and the East River Ferry Company claimed title to a certain strip of land lying between First avenue and the East river ferry, in the city of New York, as assignees of a grant from the corporation of the city to the Farmers' Loan and Trust Company. By that grant certain lands under water, east of First avenue, except a space of 100 feet in width eastward from First avenue, in continuation of 84th street, were conveyed to the grantees, and the latter covenanted that they would, within three months after being required to do so, by the grantors, at their own expense, build and erect a wharf, avenue or street, 100 feet in width, from First avenue to Avenue A, and that they would keep in good order said street, wharf and avenue embraced in said 100 feet, and that it should thereafter continue to be a public street of the city. Under this conveyance W. and the ferry company had been for several months, and at the commencement of this action still were, engaged in filling in the land owned by them, adjacent to the said 100 feet, as well as said space of 100 feet, and in constructing a sewer across the same, and were preparing to grade and pave said space. Although no proceedings had ever been taken by the city corporation to lay out 84th street as a public street, from First

avenue to the ferry-house, the strip of land between those points had been so far filled cut and graded as to be constantly used by the public, in going to and from the ferry, and for common highway purposes, generally. Two railroad companies having the right, under their respective charters and the permission of the corporation of the city, to extend their tracks across the strip of land in question, commenced, on different days, laying, constructing and extending their respective tracks in and through 84th street, and in continuation thereof, across the said strip, between First avenue and the East river ferry. *Held*, 1. That 84th street, or the strip of land in question, having been, at the time when the railroad companies commenced constructing and extending their tracks in and through it, so far filled out and graded as to be constantly used by the public as a street, those companies had a right, so far as the plaintiffs were concerned, to construct and extend their several tracks through and over 84th street, or the strip of land in question, as far eastward as the grading or the condition of the street or strip of land would permit. 2. That the legal title to the strip of land in question was not in the plaintiffs, or in either, and neither had any beneficial interest in the soil thereof. 3. That considering that such strip of land was already devoted to the public use, it did not sufficiently appear that the devotion of it to an additional public use by the construction and operation of a railroad, or railroads, upon or through it, would appreciably injure either of the plaintiffs, by interfering with the filling up, or the grading, or the construction of the sewer, so as to authorize an injunction at their suit, on the ground of such interference. 4. That even though the plaintiffs might suffer some slight damage or inconvenience, from such interference, still, considering that all railroads must be deemed to be constructed and operated for public use, an injunction ought not to be sustained, where the ability of either railroad company to pay any damages that might be recovered in an action at law was not questioned. 5. That as between the two railroad companies, both having the right to extend

their tracks in and through 34th street to the ferry, until one of them had actually commenced taking a qualified possession of the center or middle of 34th street, by locating and constructing their extension thereon, either had the right to make its extension there, to the exclusion of the other from that particular location. 6. That the company which first actually took a qualified possession of the center or middle of the street, or strip of land, by locating and constructing their extension for a part of the distance, until interfered with by the agents or servants of the other company, acquired the right to complete the construction of, and to operate, their extension, to the ferry, or as near to it as the condition of the street or strip, and the convenient operation of the ferry, would permit, to the exclusion of the right of the other company to interfere, in any way, with the construction and operation of the first mentioned company's extension as thus located. *Waterbury v. The Dry Dock, East Broadway &c. Railroad Company,* 888

RECEIVER.

1. Where one is, by a decree of the court, declared to be a mortgagee in possession, and substantially or in effect to be a trustee of the equity of redemption, he will, by subsequently accepting the office of receiver of the same property, be deemed to have assumed the duties and responsibilities of such office, unqualified or unmodified by the circumstance that he had previously been declared to be a mortgagee in possession, or by the fact that he claimed the decree to be erroneous, and that he was, and might finally be held to be, the absolute owner. *Bolles v. Duff*, 215
2. Having been appointed receiver, and accepted the appointment, his relations, claims and interests as an individual, must not be permitted to interfere with his duties as receiver, or with the purpose or interests for which he was appointed. ¶
3. His duty, as receiver, is to increase the surplus beyond what shall be found due him as mortgagee, by getting as large a rental as he reasonably can for the trust property;

and on his applying to the court, as receiver, for authority to have it leased, it is his duty to lay before the court all the information he has, or can with reasonable diligence acquire, as to the situation and value of the trust property. ¶

4. If such receiver applies to the court for an order authorizing him to lease the premises for a term of years, with a motive or purpose inconsistent with his duty and position as receiver, and an order granting such authority is made by the court, inadvertently, without careful scrutiny, and further inquiry, by a reference or otherwise, as to the situation and value of the property, and the propriety of making the order, the order should be reversed. ¶
5. If the lease executed by the receiver, under such an order, is declared void, it will be with a reservation to the lessee of the right to occupy the premises for one year from the date of his lease. ¶

See BANKS AND BANKING, 2.

JOINT STOCK ASSOCIATIONS, 6.

REFEREE'S REPORT.

1. Where a referee, in his report, entirely ignores the principal, if not the only issue in the case, and no judgment can be properly rendered until such issue is decided, the judgment entered upon his report will be reversed, and a new trial ordered. *Collins v. Clark*, 184
2. Thus where, in an action to compel the defendants to account for and pay to the plaintiff certain profits realized by them as stock brokers, on the purchase and sale of stocks for him, together with money deposited by the plaintiff with them, by way of security or margin, and for a loss occasioned by their neglect and refusal to sell when ordered to do so, the only disputed question, and the principal issue in the case was, whether the plaintiff directed the defendants to sell, on a particular day, at a specified price; and the referee, in his report, took no notice of that issue; *Held*, that as no judgment could be rendered until such issue was decided, it was a proper case for a new trial. ¶

3. A referee found, as matter of fact, that the plaintiff, on the 2d of July, 1864, shipped to the defendants 8860 bushels of oats, the property of the plaintiff; that the defendants received the oats, sold them for \$3225.67, after deducting charges and commissions, and refused, upon demand, to pay such proceeds to the plaintiff; *Held* that this made out a clear cause of action, and warranted a conclusion of law that the plaintiff was entitled to recover. *Ades v. Demorest*, 488
4. *Held*, also, that the plaintiff having given evidence tending to show that the oats in question were his property, and the defendants having given evidence tending to disprove the plaintiff's case, and to show that the oats belonged to them, and to make out a defense to the action; and the referee having believed the plaintiff's witnesses, and found in his favor upon the facts, and thus by implication negatived the defense; the report in favor of the plaintiff was not only an express finding, upon the facts, in his favor, but was in legal effect a finding against the defendants, that the defense was not established, and that no facts were proved by them which warranted a finding in their favor, upon the whole issue. *ib*
5. Before the court can reverse a judgment rendered by the referee, in such a case, it must, upon a review of the testimony, come to the conclusion that his finding upon the facts is against the clear weight of the evidence, precisely as it would hold—if the case had been tried by a jury, and their verdict, upon the same facts, was for the plaintiff—that such verdict was not warranted by the evidence. *ib*
6. The plaintiff having proved that the precise quantity of oats mentioned in the report had been delivered by him at the warehouse of H., the shipper, at or before the time of the shipment of such oats, and he producing the shipping bill of said oats, signed by H., showing the shipment of that quantity of oats on board a canal boat owned by H. and others, for and on account of the plaintiff's consignee, to the care of the defendants; *Held* that these facts clearly established, *prima facie*, at least, that the oats in question were the property of the plaintiff and had been received by the defendants as his consignees, or for his use and benefit. *ib*
7. Of these oats the defendant proved that 1258 bushels were not in fact the identical oats delivered by the plaintiff to H. and placed in store in his warehouse, but were in fact other oats purchased by W. with money obtained upon drafts drawn by him on the defendants. *Held* that upon the proofs the referee was warranted in finding that 1258 bushels of the plaintiff's oats were lent to W. and used by him; and that of the oats shipped to the defendants the same number of bushels were received and taken from W.'s oats in return for, or repayment of, the oats so lent. *ib*
8. That upon these facts there was no reasonable ground of doubt that H. & W. were jointly interested in the operation of buying and shipping oats, and that H. did, therefore, in borrowing and paying oats, in their common business and for their common benefit, bind both parties. *ib*
9. That H. therefore might lawfully, with W.'s assent, pay these 1258 bushels of oats to the plaintiff, and might lawfully ship them for him, and give and make a bill of lading, or shipping bill, in the name of the plaintiff. And that the referee might find that such were the facts, and such the true transaction. *ib*
10. Upon a judgment rendered by a referee, or a single judge, the court reviews the facts as well as the law, and upon the same principles which govern the review of the verdict of a jury. *Per E. D. SMITH, J.* *ib*

See REFERENCE.

REFERENCE.

1. Upon a reference to ascertain what, if any, damages defendants have sustained in consequence of an injunction, it is the duty of the party claiming to have sustained damages, to establish the fact, and the amount, by satisfactory proof. *Dwight v. The Northern Indiana Railroad Co.*, 271

2. If he fails to do so, and the referee, upon the evidence, finds that no damages have been sustained, his report will not be disturbed, on exceptions. *ib*

RIGHTS OF PROPERTY.

1. The rights of an individual in regard to his property should be respected; and even public officers are not at liberty to disregard such rights, unless there is a clear and urgent necessity therefor, to subserve an important and pressing public necessity. *Per INGALLS, J. Hicks v. Dorn,* 172
2. To justify a material injury to, or destruction of, the property of an individual, there must exist a pressing necessity, both in regard to the work to be performed, and the manner of executing it. *ib*

S

SCHOOL DISTRICTS.

See CONSTITUTIONAL LAW, 4 to 7.

SHIPS AND VESSELS.

See CONSTITUTIONAL LAW, 2.
JURISDICTION, 5, 6.

STATUTES.

See COMPTROLLER'S DEED.
CONSTITUTIONAL LAW.

SUPPLEMENTARY PROCEEDINGS.

1. The provisions of the Code respecting the examination of judgment debtors, on proceedings supplementary to execution, were intended to give the creditor complete authority for a full and searching examination of the debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor has made, or attempted to make, of his property. And by section 467 it is provided that its enactments are not to be strictly construed. *Forbes v. Willard,* 520
2. The object intended by the amendment to section 292, made in 1868,

providing that the debtor shall not "be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property, for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution," was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatsoever, on account of the purposes for which he might have disposed of it. *ib*

3. It could not have been the intention to restrict the inquiry to cases where formal instruments of conveyance, or assignment, had been made and delivered by him; but was to include within it all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property. *ib*
4. And it seems to have been the intention to extend the right of examination to cases where the transfer should prove to have been made by an actual delivery, following or accompanying an agreement by parol. *ib*
5. Hence, under this amendment, the debtor may properly be required to answer fully concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise; notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it; and without any qualification or restriction arising out of the nature or character of such crime. *ib*
6. In discovering the facts in reference to the source from, and the means by which he may have acquired property, the debtor may be compelled (if he is required to answer) to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1868. This he cannot properly be required to do, however, unless the case is brought within the 5th subdivision of section 292 of the Code. *ib*
7. The provision of the Code, declaring that "no person shall, on exam-

mation pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud," is not to be limited simply to a fraud in the disposition of the debtor's property, but extends to any fraud whatever. *ib*

8. Where the debtor being required to state whether he received of the plaintiff a specified sum of money, in Canada currency, at Toronto, in December, 1866, and whether he had any, and if any, what business in his own name, since November, 1866, declined to answer, on the ground that his answers would tend to show that he had been engaged in a conspiracy to defraud the public by negotiating spurious drafts; in other words, that he had acquired his property by the commission of a fraud; *Held* that the questions were pertinent to the inquiry the creditor was authorized to make, and that the debtor was bound to answer them. *ib*

See APPEAL, 3.

SUPREME COURT.

See CHARITABLE ASYLUMS, 3.
JURISDICTION, 2.

SURROGATES.

1. The incidental powers possessed by surrogates' courts previous to the Revised Statutes, and taken away by those statutes, (*Part 3, chap. 2, title 1, § 1.*) were restored by the act of the legislature of 1837, (*Laws of 1837, ch. 460, § 71.*) repealing that section of the Revised Statutes. *Campbell v. Thatcher*, 382
2. Although a surrogate, after parties in interest have been represented at a hearing before him, and final sentence or decree has been given, has no general power of opening or reversing such sentence or decree, on the ground that he erred as to the law, or decided erroneously upon the facts, he may open such decree for the purpose of correcting any mistake therein, the result of accident. *ib*
3. Executors employed counsel to make out their account for settle-

ment, and left with him their vouchers for that purpose. He made up the account, omitting, through oversight, to credit the executors with a payment of \$500. The error was not discovered until the account was presented, and then, believing that the amount would be allowed to them on the balance known to be in their hands, the executors did not ask to have the account corrected, but allowed the error to pass. The surrogate having made a final decree declaring the account finally settled, the amount in the executors' hands, and directing as to its disposition, which decree was duly entered, one of the executors applied to the surrogate, by petition, asking that the decree be opened and he be credited with such payment of \$500, and an error of \$50 which the residuary legatee had consented to allow and deduct from the amount in the executors' hands. *Held* that the transaction might be treated as a mistake or oversight, coming within the principle laid down in *Sippery v. Bauman*, (24 N. Y. Rep. 48,) and within the incidental powers possessed by surrogates' courts; and that consequently the surrogate did right in opening the decree and correcting the error complained of. *ib*

T

TAVERN-KEEPERS.

See CRIMINAL LAW, 14.

TAXES AND TAXATION.

See CONSTITUTIONAL LAW, 1.

TELEGRAPH COMPANIES.

1. It being made the duty of telegraph companies, by statute, to transmit dispatches received from other companies of the same character, on payment of the usual charges therefor, when one company receives from another a message for transmission it is bound to send the same, with care and skill, and a reasonable dispatch, on receiving the compensation demanded; and for any neglect or breach of duty in transmitting such message, it is

liable, either by virtue of a special contract, or one implied from its assuming the duty and receiving the compensation. *Baldwin v. The United States Telegraph Company*, 505

2. A telegraph company, being required by a statute to transmit messages received from other telegraph lines, on payment of the usual charges, having received its due share of the compensation paid to a connecting line for sending a message, there is a promise on its part, implied, at least, from its duty to the sender, and from its receipt of the consideration, that it will perform the duty. *ib*
3. And this promise, being made for the benefit of the sender, ensures to him, to the same effect as a promise made immediately to him, and he can maintain an action for its breach. *ib*
4. Under the provisions of the statute making it the duty of connecting lines of telegraph to receive and transmit messages from other lines, where one company receives from another a message for transmission, it is to be implied in law, and the courts may assume it to be true, that arrangements have been made between the connecting lines by which the compensation agreed upon and received at the office which receives the message, is the full compensation for all the lines over which it is sent; and that, as between themselves, the proportion of consideration received or to be received by each line is understood and regulated. And this creates an undertaking on the part of each company with the sender of the message, that it shall be transmitted over its line, and delivered according to the contract made at the receiving office. *ib*
5. It is also implied, in law, that each separate line so connecting and acting in concert, has constituted the line receiving the message, its agent for making contracts over the lines off the others. *ib*
6. In an action against a telegraph company to recover damages for its failure to transmit a message, the complaint alleged that such message, after being delivered at the office of a connecting line, and paid for, was transmitted to the defendant, but was never sent by the defendant to the person to whom it was addressed. The answer alleged that by the contract under which the message was received by the defendant for transmission, it was stipulated that the defendant would not be responsible for delays, errors, and remissness on the part of connecting lines; that it only guaranteed entire correctness when messages were repeated back, for which repetition an extra charge would be made; and that such message was not repeated, nor requested to be repeated. *Held* that the answer set up no defense; neither delay, error nor remissness being charged, but an *entire omission or refusal* to send or deliver the message, which was admitted; and that an *entire* neglect and refusal to perform the contract did not bring it within the excepted terms. *ib*
7. An answer, in such an action, alleging that at the time of the delivery of the message to the defendant, it had established certain rules, regulations and conditions upon which it would accept and undertake to transmit and deliver messages, which rules &c. were well known to the connecting telegraph line from which the message was received, and that such rules &c. constituted the agreement in the case; but not alleging that it was an agreement made between the defendant and the plaintiffs, or that the latter had any knowledge or information of such rules &c., is also defective, and constitutes no defense to the charge against the defendant of a breach of duty. *ib*
8. The statute having imposed upon connecting lines of telegraph the duty of transmitting messages for each other; and the company receiving the message and the consideration, being the agent to make contracts for the other lines with which it is in connection; the contract of the agent is the contract of the principal which undertakes the performance of the duty, and may be enforced, if made within the legitimate business of the principal, or power of the agent. The private or other arrangement between the principal and its agent, not brought home to the party who contracts

with the agent, does not affect the contract, as to such party. *ib*

TITLE.

See COMPTROLLER'S DEED.
JUSTICES' COURTS.
POSSESSION.

TORT.

See ACTION, 1, 2, 3.
ARREST.
JURISDICTION, 1, 2.

TOW-BOATS.

1. A tow-boat company engaged in the business of towing is not, for such purposes a common carrier, nor subject to the liabilities assumed by such engagements. *The Artis Fire Ins. Co. v. Austin*, 559
2. The proprietors of a tow-boat so engaged are liable for negligence in performing the special duty they have undertaken, and not otherwise. *ib*
3. The words "at the risk of the master or owners," in a permit for the towing of a boat, do not excuse the proprietor of the tow-boat from liability for negligence in performing his contract. *ib*
4. The master of a tow-boat is not chargeable with negligence because the captain of the boat towed fails to provide a watch or lights on board his boat. *ib*
5. The captain of a tow-boat has not the entire charge and control of the boats he takes in tow. Although the latter are attached to his vessel, the captains and crew are on board, and are required to use care and caution on their part. They are not the servants of the captain of the towing boat. *ib*
6. It is the duty of the captain of the boat towed to see to its guidance, to steer it when necessary, and to take the necessary precautions on his part. If he omits such care and precaution, and injury arises from such neglect, he, and not the owner of the tow-boat, is to bear the consequences. *ib*
7. Although the master of the towing boat may, as a matter of precaution,

give directions as to what is necessary or proper to be done, on board of the boat towed, yet the omission to give such directions is not clearly negligence on his part. It may go to the jury as a fact bearing upon the question of negligence. *ib*

TROVER AND CONVERSION.

1. By the rules of practice and pleading before the Code, an action of trover could not be sustained without proof of a detention or conversion of the property alleged to have been unlawfully taken; but as the forms of pleading do not now control, the court, in an action for wrongfully taking and carrying away and converting property, must examine the evidence, and if the proof, or facts found by the jury, entitle the plaintiff to a judgment, such judgment should be given, even though not asked for by the complaint. *Edridge v. Adams*, 417
2. The plaintiff having in his possession a buggy wagon which he had hired for a year, from J., let it to the defendant. It was used by H. and was brought back and received by the plaintiff. The wagon having been injured by H. during its use, the plaintiff sent it to a shop, for repair. H. afterwards told him to get the wagon fixed and he would pay for it; the defendant becoming his surety for such repairs. Subsequently H. and the defendant took the wagon to another shop, had it repaired and returned it to the plaintiff, before suit brought, and it remained in his possession. *Held* that the bailment of the wagon continued until it was repaired and returned; and there being an implied license from the plaintiff to H., and the defendant acting under him, to have the wagon repaired, the removal of it from one shop to another, for that purpose, was not an unlawful taking of the property. *ib*
3. *Held, also*, that there was no conversion; that the defendant was guilty only of a mere asportation; he did not interfere with the plaintiff's dominion over the wagon; his title being recognized and acknowledged, throughout; it was not taken or detained with the intent to convert it

to the defendant's use, or the use of any one else; he assumed no ownership over it; and it was not injured while in his possession. *ib*

4. *Held, further*, that even if it were conceded that the defendant was guilty of a technical trespass, the plaintiff was not entitled to recover the full value of the wagon. That he having but a special property in the wagon, under a bailment for a year, and it not having been converted, J., the general owner, could, at the expiration of the year, follow and take it, wherever found. *ib*

5. That there being not only no conversion, but a return of the property before suit brought, the plaintiff's refusal, then, to accept it, entitled him to recover only the value of his special property. And that, in the absence of any proof of the value of the plaintiff's special interest in the wagon, the court could not assume it to be over six cents. *ib*

TRUSTS AND TRUSTEES.

1. A husband, on his separation from his wife, created a trust and supplied a fund (of \$50,000) to be exclusively reserved for her maintenance. By a deed of separation, executed by the husband and his wife, as well as by the trustees, it was stipulated that the fund should be invested in a certain manner, and the proceeds applied to the maintenance of the wife. A portion thereof (\$20,000) was to be kept invested on bond and mortgage during her life. The wife was empowered to dispose, by will, of the whole or any part of the fund which might remain unexpended, at her death. Following a covenant that the husband would permit his wife to live separate and apart from him, and that he would not exercise or claim marital control over her, or interfere with her in any manner, there was a stipulation in the deed that nothing therein contained should preclude the husband from taking all lawful means, should the occasion arise, to compel the performance of the trusts and agreement embraced therein. *Held* that the husband had a sufficient legal and equitable interest in the trust fund to authorize him to

intervene for its protection, by an action against the wife and trustees, if there was reason to fear that the fund would be diverted from the purpose for which it was provided. *BUTHERLAND, J., dissented. Cranson v. Plumb,* 59

2. *Held, also*, that if the trust was faithfully executed, the \$20,000 required to be kept invested on bond and mortgage during the life of the wife, would be unexpended at the time of her decease; and as it was possible that the wife might make no disposition of the trust fund, or any portion of it, by will, and the estate of the trustees would, in that event, cease, and whatever should remain unexpended would revert to the husband, as the donor; these circumstances gave him a pecuniary interest in the fund, which justified him in applying to the court for the protection and preservation of the fund, during the life of the wife. *ib*

8. By the terms of a trust deed the grantor professed to create a trust in the property conveyed, for the benefit of his wife and five minor children. The instrument required the trustee to collect and receive the moneys, proceeds and income arising from any disposition that might be made of the premises and property granted and sold, and to invest the same in good and safe interest-paying securities, and to collect and receive the interest and income arising therefrom, and also, in his discretion, the principal, and for that purpose to dispose of such securities as he should think best, whether from interest or principal, again to invest and to reinvest, in his discretion; and out of the moneys or income arising from the property granted and sold, or the proceeds thereof, to pay the expenses of executing and carrying out the trust, and a reasonable compensation to him for his services as trustee; and to apply the balance of the said income, and the principal, so far as in his judgment might be required, to the support and maintenance of the grantor's wife and children. And on the arrival of the youngest of said children then living, at the age of twenty-one years, or upon the decease of M. and A., the two youngest children, should they die before

that time, to convey to the children then living, and to the grantor's wife, or to such of them as should survive, and the descendants of any such of them as might be dead, the said property then remaining in trust, in equal shares and proportions; the descendants of the deceased child to take the share their parent, if alive, would have taken. *Held* that the effect of the language used in the deed was, that the trust should continue until the grantor's youngest child then living should attain twenty-one years of age, in case that age was reached within the lifetime of M. and A. That if it should be, then the trustee must convey to the grantor's wife and children, even if all of them should at that time be living. That if that age should not be attained while M. and A. were living, then at their decease he must convey, if every one of the surviving children at that time should continue to be minors. *Levy v. Hart*, 248

4. That there could be no possibility, therefore, of the estate of the trustee extending beyond the duration of the two designated lives; and it was not within the prohibition of the statute relating to future estates in lands, or the statute relating to the suspension of the ownership of personal property. *ib*

5. Both those statutes allow the title to be suspended for two lives in being and ascertained when the deed is made; and no greater suspension was provided for in this case. *Per DANIELS, J.* *ib*

6. If a trust is void, as suspending the power of alienation, and the absolute ownership of the property conveyed, beyond the period of two lives in being when the trust was created, the grantor of the trust cannot maintain an action in equity to set aside the trust deed on the ground that such is its legal character. If it be void, it cannot be even a cloud upon the grantor's title; because, if void upon its face, it cannot by any possibility be productive of injury to him, or his estate, and therefore will furnish no ground authorizing a court of equity to remove it, as likely to prejudice the grantor, or his estate. *ib*

7. The grantor in a trust deed, as the legal owner of the property conveyed, has no right to maintain an action to obtain a construction of the deed. That privilege is confined to the trustee, or those claiming under the trust and requiring its execution. *ib*

V

VARIANCE.

See PRACTICE, 4.

VENDOR AND PURCHASER.

1. S. sold and sent to O. a quantity of liquors, under an agreement that if O. sold out his hotel he might send back the unsold liquors to S. O., after having sold only a small portion of the liquors, sold his hotel, and sent the balance of the liquors to the railroad depot, to be shipped back to S. While they were still at the depot, marked and directed to S., they were seized by the defendant, as sheriff, upon an attachment against the property of O. *Held* that even assuming that the title passed to O. on the delivery of the goods to him, the delivery of the liquors at the depot, for reshipment to the vendor, in pursuance of the original contract, reinvested the latter with the title. *Sutton v. Crosby*, 80

2. *Held, also*, that the assent of the vendor to receive back the property in case the purchaser should sell his hotel, made the delivery of the property to the carrier, for the purpose of returning the same to the vendor, valid and effectual to reinvest S. with the title, as upon a resale of the liquors. *ib*

3. A bill of sale, containing a description of the goods sold, such as is generally furnished by vendors, is not conclusive as to the terms upon which the goods were sold. Though *prima facie* evidence of a sale, it does not preclude the vendor from showing the actual facts respecting such sale. *ib*

See PRACTICE, 3, 4.

VILLAGES.

See MUNICIPAL CORPORATIONS, 3 to 6.

W

WAIVER.

A party, except perhaps in certain instances where the public have an interest, may always waive a right to which he is entitled; and such waiver may be either by an express stipulation, or by doing some act inconsistent with an intention to claim his right. *Phillips v. Snydam*, 158

See ACTION, 2.
AGREEMENT, 5.
AMENDMENT, 2, 5.
CONTEMPT, 1.

WARRANTY.

A warranty that a span of ponies are all right for livery purposes cannot, it seems, be construed into a special undertaking that they are not *with foal*. One of them being *with foal*, is not an unsoundness within the meaning of a general warranty. In case of fraud, it seems, an action would lie for special damages. *Whitney v. Taylor*, 586

See OPINIONS OF WITNESSES.

WILL.

1. Execution.

1. Where one of the attesting witnesses to a will testified that the testatrix told her, in the room where and when the same was executed, before signature, that the paper or papers constituting the same was or were her will; and the other witness swore that although the testatrix did not say, while she was in the room, where and when the papers were executed, that they were her will; yet, that when the testatrix came to the kitchen to call her as a witness, she told her that she wanted her to witness her will; *Held* that this evidence, together with proof that the testatrix signed the instruments in the presence of the two witnesses, and that they signed their names as witnesses in her presence, and in the presence of each other, was sufficient to show that they were executed and attested in the manner required by the statute. *Matter of the probate of Forman's will*, 274

2. Testamentary capacity of testator.

2. What is sufficient proof of the testamentary capacity of a testator at the time the will was executed and attested. *Matter of the probate of Forman's will*, 274

3. The words "*mind and memory*," as used in our statute relating to wills of personal property, and as used at common law, are and were convertible terms. *ib*

4. The question, in respect to testamentary capacity, in the abstract, is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make a will; that is, to do the thing or act authorized by the statutes; but practically, in most cases, the question is, had the testator, at the time, &c., a mind, or mind and memory, sufficiently sound to make the will in question. *ib*

5. The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe. A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects, and not as to others. *ib*

6. Moral insanity is a disorder of the feelings and propensities, and may or may not impair the intellect. Legal insanity is a disorder of the intellect. *ib*

7. Moral insanity, not proceeding from or accompanied by insane delusion, the legal test of insanity, is insufficient to set aside a will. *ib*

8. Where it appeared from the evidence that at the time a will was executed the testatrix despised, distrusted and hated her husband, and probably feared him, and it was a fair inference from the evidence that these feelings towards her husband caused her to execute the will in question; and there was no doubt that she intended thereby to prevent him from getting any more of her estate than was given to him by such will; *Held* that in testing the testamentary capacity of the testatrix, the question was not whether these feelings towards her husband, at the time, &c., were unreasonable, excessive or

- unjustifiable merely, or even whether they amounted to, or showed, *moral* insanity as to her husband; but was whether these feelings were insane—whether the contempt, distrust, hatred and fear, which she had of and for him, at the time, was *insane* contempt, *insane* distrust, *insane* hatred, *insane* fear; or, in other words, the contempt, the distrust, the hatred, the fear of an insane wife towards her husband. *ib*
9. And, the preliminary proofs showing that the testatrix, at the time when, &c., was competent or had testamentary capacity to execute the will; and that her feelings towards her husband caused her to execute the instrument as and for her will, and influenced her dispositions of property by it; *Held, further*, that it was for the contestants satisfactorily to show that these feelings towards her husband came from, or originated in, or at least were accompanied by, delusion as to her husband, his character, conduct, motives or condition. *ib*
10. And the proofs not showing that the testatrix's contempt for her husband, her distrust, fear and hatred of him, when she executed the will, came from, or originated in, or were accompanied by, delusion as to her husband, his character, conduct, motives or condition; it was *held* that the testatrix, at the time she executed the will, must be deemed to have had testamentary capacity, and was competent to execute the instrument as her will. *ib*
3. *Probate.*
11. Two written instruments, executed by the same person, at the same time, may, notwithstanding their repugnancy in certain particulars, or in certain respects, constitute a will, or the will of such person, and legally and properly be admitted to probate as such. *Matter of the Probate of Forman's will,* 274
12. The point or question of repugnancy or inconsistency in the provisions of the two instruments may be a subject or question for consideration, after the probate of the will, when the two instruments come to be carried into effect, or claimed or acted under, as a will, but does not arise, and cannot properly be considered, in the probate proceedings. *ib*
4. *Revocation.*
13. Where a testatrix, at the time she tore up and destroyed a will previously executed by her, was, though not permanently insane, in a condition and laboring under an excitement, which, under the circumstances, incapacitated her for forming or having a reasonable or intelligent intention of revocation; *Held* that such act was not to be regarded as a revocation of the will. *Matter of the probate of Forman's will,* 274
- WITNESS.
- Where a witness declines to answer questions propounded to him, on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if required to be given; and if not, he should be required to answer the questions. *Forbes v. Willard,* 520
- See CRIMINAL LAW, 7.
SUPPLEMENTARY PROCEEDINGS.
- WRITTEN INSTRUMENTS.
- The general rule is that two or more written instruments, executed at the same time, relating to the same subject matter, by the same party, or between the same parties, should be construed together, and viewed as one instrument. *Matter of the probate of Forman's will,* 274



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